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1958

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London
THE INCORPORATED COUNCIL OF LAW REPORTING
FOR ENGLAND AND WALES

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1958

MEMORANDA

1958.

Jan. 10. JUDGE GEOFFREY WALTER WRANGHAM *was appointed to be one of the Justices of Her Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, and a knighthood was conferred upon him.*

Jan. 10. HERBERT EDMUND DAVIES, ESQ., Q.C., *was appointed to be one of the Justices of Her Majesty's High Court of Justice, Queen's Bench Division, and a knighthood was conferred upon him.*

Jan. 10. RICHARD EVERARD AUGUSTINE ELWES, ESQ., Q.C., *was appointed to be one of the Justices of Her Majesty's High Court of Justice, Queen's Bench Division, and a knighthood was conferred upon him.*

Jan. 23. LORD MAUGHAM, *sometime Lord Chancellor, died, aged* 91.

Sept. 30. THE HON. SIR HENRY GORDON WILLMER, *a Justice of Her Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, was appointed to be one of the Lords Justices of Appeal, and was sworn a member of the Privy Council.*

Sept. 30. GERALD ALFRED THESIGER, ESQ., Q.C., *was appointed to be one of the Justices of Her Majesty's High Court of Justice, Queen's Bench Division, and a knighthood was conferred upon him.*

Sept. 30. JOSEPH BUSHBY HEWSON, ESQ., Q.C., *was appointed to be one of the Justices of Her Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, and a knighthood was conferred upon him.*

Sept. 30. THE RT. HON. LORD GODDARD, *Lord Chief Justice of England, who was appointed Lord Chief Justice in January,* 1946, *after having been a Justice of the King's Bench Division from* 1932 *to* 1938, *a Lord Justice of Appeal from* 1938 *to* 1944, *and a Lord of Appeal in Ordinary from* 1944 *to* 1946, *retired, and was appointed a Knight Grand Cross of the Order of the Bath.*

Sept. 30. THE RT. HON. LORD JUSTICE PARKER *was appointed to be Lord Chief Justice of England, with the style and title of Baron Parker of Waddington, of Lincoln's Inn in the Borough of Holborn.*

Oct. 16. THE HON. SIR STEPHEN OGLE HENN COLLINS, *a Justice of Her Majesty's High Court of Justice, from December,* 1937, *to June,* 1948, *died, aged* 83.

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Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL

J. C.*

1957
Oct. 2.

SPELDEWINDE (COMMISSIONER OF INCOME TAX) APPELLANT;

AND

J. L. D. PEIRIS . . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Revenue—Income tax—Business—Cessation on death—Computation of statutory income—Correct statutory basis—Income Tax Ordinance (Legislative Enactments of Ceylon, 1938, *c.* 188), *s.* 11 (1), (2), (6) (*a*) (*b*).

Revenue—Income tax—Discontinuance of trade.

Subsection (1) of section 11 of the Income Tax Ordinance of Ceylon provides that the statutory income of every person for each year of assessment from each source of his profits and income shall be the profits or income arising during the year preceding the year of assessment, notwithstanding that he may have ceased to possess such source of income. By section 11 (6) of the Ordinance: "Where "a person . . . ceases to carry on . . . business . . . in Ceylon . . . "his statutory income therefrom shall be—. . . (*b*) as regards the "year of assessment preceding that in which the cessation occurs, "the amount of the statutory income as computed in accordance "with the foregoing subsections, or the amount of the profits of such "year, whichever is the greater, . . .":—

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* *Present*: EARL JOWITT, LORD RADCLIFFE, LORD TUCKER, LORD DENNING and the RT. HON. L. M. D. DE SILVA.

Held, that on death a person ceased within the meaning of subsection (6) of section 11 of the Ordinance to carry on a business which he had been carrying on previous to death. Accordingly, where the income from an agricultural business which had been carried on by a person who died in October, 1951, was greater in the year 1950–1951 than it was in the year 1949–1950—the year of assessment preceding that in which she died—her statutory income for the purposes of assessment to income tax was rightly computed on the income of the year 1950–1951 under section 11 (6) (*b*) and not by reference to the general rule in section 11 (1).

Judgment of the Supreme Court of Ceylon (1956) 58 C.N.L.R. 4 reversed.

APPEAL (No. 26 of 1956) from a judgment of the Supreme Court of Ceylon (Gratiaen and Gunasekara JJ.) (March 2, 1956) dismissing an appeal by the present appellant against a determination of the Board of Review whereby it was held that the income tax assessment on the respondent in respect of the year from April 1, 1950, to March 31, 1951, should be computed under the provisions of section 11 (2) and not under those of section 11 (6) (*b*) of the Income Tax Ordinance of Ceylon.

The matter arose on an additional assessment to income tax made under section 11 (6) (*b*) on the respondent as executor of Mrs. N. C. Peiris, who carried on an agricultural business and who died on October 23, 1951, in respect of part of her income for the year of assessment April 1, 1950, to March 31, 1951. The Board of Review allowed the appeal of the respondent against that assessment, which had been confirmed by the Commissioner of Income Tax, and stated a case for the opinion of the Supreme Court in relation to the following question: "On the "facts as admitted between the parties did Mrs. N. C. Peiris, "upon her death on October 23, 1951, cease to carry on or "exercise a trade or business, profession or vocation in Ceylon "within the meaning of section 11 (6) of the Income Tax "Ordinance? If so, does paragraph (*b*) of section 11 (6) of the "said Ordinance apply for the purpose of computing the statutory "income of Mrs. Peiris for the year of assessment preceding that "in which she died?" The Supreme Court answered the questions in the negative and in favour of the respondent. The commissioner now appealed.

The relevant statutory provisions appear from the judgment of the Judicial Committee.

1957. July 8, 9. *John Senter Q.C.* and *Sir Reginald Hills* for the appellant. The additional assessment was made under

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section 11 (6) (*b*) of the Ordinance to bring the profits originally assessed up to the actual profits. The executor appealed against the additional assessment to the commissioner on the ground that the profits in question should have been computed under section 11 (2); he contended, inter alia, that the words in section 11 (6) " Where a person . . . ceases to carry on . . . business " did not extend to a case where the cesser arose by reason of death, but applied only to the cesser of business by a living person. The point for decision now is essentially a short one of the construction of those words " where a person ceases to carry on business." The terms of section 11 (6) are quite unqualified. It is said in the case stated that " cessation " in section 11 (6) " connotes a " voluntary act—a determination by the assessee to cease the " activity." There are, however, it is submitted, taking subsection (6) by itself, no words of qualification to import any such limitation. The only variation of the general rule appearing in section 11 (1) is that provided by subsection (9), which applies only to the computation of income for the year in which death takes place. *Allen* v. *Trehearne* (*Inspector of Taxes*)[1] shows that when one is considering the case of somebody ceasing to hold an office, it is wide enough to include the case of death. On a natural and clear construction of subsection (6) of section 11 the deceased ceased to carry on or exercise her business on the date of her death, and that was the date on which the cessation occurred within the meaning of the subsection. The additional assessment to income tax was accordingly rightly made under section 11 (6) (*b*) of the Ordinance in respect of the profits from the agricultural business of the deceased of the year of assessment 1950–1951.

Sir Reginald Hills following. Mrs. Peiris did not carry on any business after her death; nobody has suggested that she did. On that footing no one can doubt that the words of section 11 (6) cover this case unless there are other words cutting down the plain meaning of the subsection. It is not a sound construction of subsection (9) to say that it reduces the plain terms of subsection (6). There may be an overlap. The clear reason for subsection (9) was to deal with all those objects which had not been dealt with in subsection (6). There is no reason for taking out of subsection (6) a ceasing to exercise a trade from whatever reason.

Roy Borneman Q.C. and *H. Major Allen* for the respondent. The deceased obviously did not go on carrying on her business after her death. Every subsection of section 11 must be read in its context, and subsection (9) is a complete code and covers exhaustively cases of death, and then says what is the result—that it covers one period only. The court should lean against the legislature providing for overlapping. They would not make two provisions covering the same circumstances—if subsection (9) is all-embracing to cover cessation on death, it would be most extraordinary to have another subsection of equal weight. Subsection (6) shows that the legislature had in mind a person who goes on living after he ceased to carry on business. In the case of a trader who dies, the provisions of section 11 (9) override those of section 11 (6) (*b*) and the provisions of section 11 (6) are not applicable. The words in *Hunter* v. *Dewhurst*,[2] that " you cannot vacate an office better than by " dying in it," must be read in their context. The words " ceases " to carry on a business " in the Ordinance must be interpreted according to the context in which they appear, and in that context are not apt to apply to the state of affairs arising out of the death of a trader. *Allen* v. *Trehearne* [3] does not affect the submissions for the respondent at all.

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[1] [1938] 2 K.B. 464; 54 T.L.R. 826.

Senter Q.C. replied.

October 2. The judgment of their Lordships was delivered by the RT. HON. L. M. D. DE SILVA. Under section 5 of the Income Tax Ordinance of Ceylon (Legislative Enactments of Ceylon, 1938, c. 188), " a year of assessment " commences on April 1 of each year and ends on March 31 of the subsequent year. The tax payable for any year of assessment is computed on the income of the preceding year of assessment subject to the provisions of later sections which, in particular cases, prescribe another period. " Income," " profits " and " profits and " income " are each defined to mean the same thing.

Section 5 reads: " 5.—(1) Income tax shall, subject to the " provisions of this Ordinance and notwithstanding anything " contained in any other written law or in any convention, grant, " or agreement, be charged at the rate or rates specified herein- " after or fixed by resolution under section 20A, for the year " of assessment commencing on the first day of April nineteen " hundred and thirty-two, and for each subsequent year of " assessment in respect of the profits and income of every person " for the year preceding the year of assessment—

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[2] (1930) 16 T.C. 605, 615, 623.

[3] [1938] 2 K.B. 464.

“ (*a*) wherever arising, in the case of a person resident in “ Ceylon, and

“ (*b*) arising in or derived from Ceylon, in the case of every “ other person,

“ but without prejudice to any provisions of this Ordinance which “ enact that tax is to be charged in particular cases in respect “ of the profits and income of a period other than the year “ preceding the year of assessment.”

The Ordinance in Chapter IV makes provision for the “ Ascertainment of Statutory Income,” in Chapter V provides for the ascertainment of “ Assessable Income ” from “ Statutory “ Income,” and in Chapter VI provides for the ascertainment of “ Taxable Income ” from “ Assessable Income.” On taxable income tax is levied at the appropriate rate.

It is not necessary for the purposes of this case to consider the steps by which the amount of taxable income is ultimately ascertained; it is sufficient to note that the amount of the taxable income depends in each case upon the amount of the statutory income.

Section 6 provides: “ 6.—(1) For the purposes of this Ordin- “ ance, ‘ profits and income ’ or ‘ profits ’ or ‘ income ’ means— “ (*a*) the profits from any trade, business, profession, or vocation “ for however short a period carried on or exercised.” The other provisions of the section are not relevant to this case.

The respondent is the executor of a Mrs. N. C. Peiris who had carried on an agricultural business and had died on October 23, 1951. The question for decision in the case is whether the appellant, the Commissioner of Income Tax, has correctly determined the statutory income of the respondent for the year 1950–1951.

Subsections (1) and (2) of section 11 are to the following effect: “ 11.—(1) Save as provided in this section, the statutory “ income of every person for each year of assessment from each “ source of his profits and income in respect of which tax is “ charged by this Ordinance shall be the full amount of the “ profits or income which was derived by him or arose or accrued “ to his benefit from such source during the year preceding the “ year of assessment, notwithstanding that he may have ceased “ to possess such source or that such source may have ceased to “ produce income.”

It will be seen that under this subsection the statutory income of a person for any year of assessment is based upon his income for the preceding year. Other subsections of section 11 provide that in particular cases the basis is to be the income of specified periods other than the preceding year. Subsection (2) of section 11 is one of such subsections and is to the following effect: "(2) Where the commissioner is satisfied that any person usually "makes up the accounts of a trade, business, profession, vocation "or employment carried on or exercised by him to some day "other than the thirty-first day of March, he may direct that "the statutory income from that source be computed on the "amount of the profits of the year ending on that day in the "year preceding the year of assessment . . ."

An order was made by the appellant under this subsection, but as it makes no difference to the matters which arise for consideration it will not be referred to further. The appellant contends that on the death of Mrs. Peiris she ceased to carry on her business within the meaning of subsection (6) of section 11, which is another of the subsections providing a period other than that prescribed by subsection (1). It is to the following effect: "Where a person whether resident or non-resident ceases to carry "on or exercise a trade, business, profession, vocation, or employ"ment in Ceylon, or, being a resident person, elsewhere, his "statutory income therefrom shall be—

> "(*a*) as regards the year of assessment in which the "cessation occurs, the amount of the profits of the period "beginning on the first day of April in that year and ending "on the date of cessation; and
>
> "(*b*) as regards the year of assessment preceding that "in which the cessation occurs, the amount of the statutory "income as computed in accordance with the foregoing sub"sections, or the amount of the profits of such year, which"ever is the greater,

"and he shall not be deemed to derive statutory income from "such trade, business, profession, vocation, or employment for "the year of assessment following that in which the cessation "occurs." There is a proviso to the subsection which has no bearing on this case.

For the year of assessment 1950–1951 the appellant has assessed the respondent under subsection (6) (*b*) on the income of the year 1950–1951 as this income was greater than the income for the year 1949–1950. The respondent contends that subsection (6) has no application to a case of death and that the consequences of death are covered by subsection (9), which is to the following effect: "Where any person dies on a day within "a year of assessment, his statutory income for such year shall "be the amount of profits and income of the period beginning "on the first day of April in that year and ending on that day, "and the profits and income arising from his estate from such "day to the end of the year of assessment shall be statutory "income of his executor for that year of assessment, and for "the following year of assessment the statutory income of his "executor from the estate shall be the profits and income of one "year from that day." Subsection (9) makes no special provision (as subsection (6) does) for the year preceding the year of assessment in which a person dies, and, if the respondent is right, the assessment for 1950–1951 would, as he contends, be on the income for the year preceding the year of assessment, namely, 1949–1950.

Their Lordships have had some difficulty in deciding which of these contentions should be upheld. The respondent contends that the words "person ceases to carry on a business" (to be found, among others, in subsection (6)) would be language unusual, if not inappropriate, to describe an occasion where a cessation of business is caused by death. This argument has some weight. But in their Lordships' opinion it must give way to the consideration that a person on death undoubtedly ceases to carry on business. It was said in *Hunter* (*Inspector of Taxes*) v. *Dewhurst* [1] that "you cannot vacate an office better than by "dying in it." It appears to their Lordships that on death a person does vacate his office, and, equally, that on death a person ceases to carry on a business which he had been carrying on previous to death.

Counsel for the respondent was constrained to concede that section 11 (6) would apply to a case where cessation was not voluntary, as, for instance, when cessation of business is caused by an illness necessitating cessation. Death may supervene in such an instance. It would be a curious result if in the cases of death preceded by an illness necessitating cessation of business section 11 (6) was applicable and in cases of death without such an illness it was not. Death not infrequently occurs soon after an illness has commenced.

The learned judge of the Supreme Court who delivered the main judgment said [2]: "I agree with the Board of Review that "section 11 (6) is intended only to deal with cases where an "assessee does not cease to be a 'a person' when he ceases to "carry on his trade, business, profession or vocation. Section "11 (6) appears to me to contemplate a person who, at the

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[1] (1932) 16 T.C. 605.

[2] (1956) 58 C.N.L.R. 4, 7.

"moment of cessation, continues to have a place of 'residence' "(either in Ceylon or elsewhere) and continues to be a potential "income-earner liable to further taxation under the Ordinance."

This view appears to adopt the argument discussed above which their Lordships have been unable to accept. It was argued further that subsections (6) and (9) of section 11 should be regarded as containing mutually exclusive sets of provisions each constituting an exception or exceptions to the general rule that assessment for any particular year should be computed on the profits of the previous year. It was argued that subsection (6) was not applicable to cases of death. Subsection (6), however, does not in terms exclude cases of death and subsection (9) does not in terms purport to deal exhaustively with cases of death. It was necessary to enact subsection (9) to provide for the consequences of death in a year of assessment on the computation of statutory income from sources other than the sources "trade, "business, profession, vocation, or employment" provided for by section 11 (6), but the necessary provision has been made broadly and the language used has caught up the provisions of section 11 (6) (*a*) in so far as it relates to cases of death. The last-mentioned fact no doubt lends some support to the argument that neither section 11 (6) (*a*) nor section 11 (6) (*b*) is applicable to a case of death, but in their Lordships' opinion it is not strong enough to defeat the view already expressed. Their Lordships do not think that subsection (9) deals with all the consequences of death.

The Supreme Court also said[3]: "Let it be conceded that "section 11 (6) prima facie covers a case of 'cessation' by "death. Even on that assumption, section 11 (9) is clearly an "exception to paragraph (*a*) of section 11 (6) because it provides "for a special computation of the deceased's entire income during "that year of assessment, and not merely of his income from "one particular source. If, therefore, paragraph (*a*) of section "11 (6) does not apply in respect of the year in which the death "occurred, paragraph (*b*) of section 11 (6) must also be ruled "out as far as the preceding year is concerned."

Their Lordships are unable to agree. Section 11 (9) is not an exception to paragraph (*a*) of section 11 (6). Undoubtedly section 11 (9) overlaps paragraph (*a*) of section 11 (6), but it is not an exception to the provision in the paragraph. Section 11 (9) makes the same provision in respect of income from all sources on the occurrence of death in a year of assessment as paragraph (*a*) of section 11 (6) does in respect of income from a business and certain other specified sources on a cessation of those sources in a year of assessment. It would be possible to apply the provision so made to the year of assessment in which a person dies under either of the two subsections. Some confusion could have been avoided if the sources covered by paragraph (*a*) of section 11 (6) had been excepted from section 11 (9) as those sources had already been provided for. But, in their Lordships' view, the failure to do so on the part of the legislature does not make section 11 (6) inapplicable to cases of death.

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[3] 58 C.N.L.R. 4, 7.

Their Lordships will humbly advise Her Majesty that the appeal be allowed and the order of the commissioner restored. The respondent must pay the costs of this appeal and of the proceedings in the Supreme Court.

Solicitors: *T. L. Wilson & Co.; Stephenson, Harwood & Tatham.*

C. C.

[HOUSE OF LORDS.]

QUINN . . . . APPELLANT;

AND

CAMERON & ROBERTON LTD. . . . RESPONDENTS.

H. L. (Sc.)*
1957
Jan. 31;
Feb. 4, 5, 6;
Mar. 14.

Factory—Dust—Grinding of metals—"Grinding" and "cleaning of "castings"—Whether mutually exclusive—"Abrasive wheel"—Wheel "of bonded emery or similar abrasive"—Meaning of "similar"—Carborundum—Silica dust—Pneumoconiosis—Grinding of Metals (Miscellaneous Industries) Regulations, 1925 (*S.R. & O.*, 1925, *No.* 904), *reg.* 1.
Causation—Breach of statutory duty.
Negligence—Safe system of work—Dust, injurious—Iron foundry—Silica—Exhaust appliances—Respirators.

The Grinding of Metals (Miscellaneous Industries) Regulations, 1925, contain the following definitions: "*Grindstone* means a "grindstone composed of natural or manufactured sandstone, but "does not include a metal wheel or cylinder into which blocks of "natural or manufactured sandstone are fitted. *Abrasive Wheel* "means a wheel manufactured of bonded emery or similar abrasive.

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* *Present*: VISCOUNT SIMONDS, LORD OAKSEY, LORD MORTON OF HENRYTON, LORD COHEN and LORD KEITH OF AVONHOLM.

"*Grinding* means the abrasion by aid of mechanical power, of "metal, article of metal, or part of any article of metal by means "of a *grindstone* or *abrasive wheel* . . . *Cleaning of castings* "means the freeing of castings from adherent sand or other "substance, and includes . . . the removal of ingates, risers or "other projections or excrescences, and the general smoothing of "the castings."

By regulation 1: "No racing, dry grinding, or glazing "ordinarily causing the evolution of dust into the air of the room "in such manner as to be inhaled by any person employed shall "be performed without the use of adequate appliances for the "interception of the dust as near as possible to the point of origin "thereof, and for its removal and disposal . . . and for the purpose of this regulation the appliances shall not be deemed "adequate unless they either include—(*a*) a hood or other appliance, "so constructed, arranged, and placed as substantially to intercept "the dust thrown off; and (*b*) a duct of adequate size . . . so "arranged as to be capable of carrying away the dust . . . and "(*c*) a fan or other efficient means of producing a draught sufficient "to extract the dust . . ."

From 1942 to 1951 the appellant was employed as a grinder at the respondents' iron foundry where iron castings were cast in sand in moulding boxes. After most of the sand had been removed superfluous metal excrescences and any still adherent sand were removed by a grinding machine known as a "plough buff," a frame suspended from a radial arm hinged at one end to a vertical girder. The frame contained a carborundum grinding wheel driven by an electric motor. Carborundum is a silica carbide. The plough buff was not equipped with apparatus to draw off the dust evolved. Heavy particles were flung off horizontally to the back of the frame but the lighter particles, including the dangerous invisible particles, of silica dust rose vertically into the air and were liable to be inhaled by any person working in the shop. In this action the appellant, who had contracted pneumoconiosis, alleged that it was either caused or aggravated by the fault of the respondents, basing his claim on fault at common law or breach of the statutory regulations:—

Held, (1) that the operations of "grinding" and "cleaning of "castings" were not mutually exclusive.

Wardlaw v. *Bonnington Castings Ltd.* 1955 S.C. 320 approved.

(2) That the wheel was not a "grindstone," as defined, but (Lord Morton of Henryton dissenting) that it was an "abrasive "wheel," as defined. Accordingly, since the appellant was engaged in the operation of "grinding" as well as "cleaning of castings," the regulations applied.

Per Lord Morton of Henryton (dissenting). In order to come within the definition of "abrasive wheel" the wheel must be "of "bonded emery or similar abrasive," i.e., an abrasive with some quality as a material similar to bonded emery. There was not sufficient evidence to establish whether carborundum possessed such qualities.

Per Lord Keith of Avonholm. "Similar abrasive" refers to the function performed by the abrasive and not to its chemical family.

Held, further, that on the evidence the dust, which would have been intercepted if the regulation had been complied with by the provision of apparatus "substantially to intercept the dust," had a relevant causal connexion with the appellant's disease.

Held, further, that the respondents had not been guilty of negligence at common law.

Decision of the First Division of the Court of Session, 1956 S.C. 224 reversed.

APPEAL from the First Division of the Court of Session.

This was an appeal against interlocutors pronounced by Lord Guthrie, one of the Lords Ordinary of the Court of Session, dated March 24, 1955, and by the First Division of the Court dated March 16, 1956, in an action against the respondent company, Cameron & Roberton Ltd., at the instance of the appellant, Daniel Quinn. Both interlocutors were in favour of the respondent company. As pursuer in the action, the appellant claimed damages from the respondent company, as defender, on the allegation that he suffered from pneumoconiosis and that the disease was either caused or aggravated by the fault of the respondent company. His case was based on fault in common law and on the alleged breach by the respondent company of a duty said to have been imposed on it by regulation 1 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925. The respondent company submitted that the interlocutors were well founded in fact and law and should be affirmed.

The circumstances on which the appellant's claim was based were set out in his pleadings and may be summarized as follows: For a period of about nine years ending in February, 1951, he was employed by the respondent company as an iron grinder in their Star Foundry, which was an iron foundry. In the shop in which he was employed there was carried out dressing of castings by various means, including high speed buffs and plough buffs (otherwise swing-frame grinders). It was his duty to operate both types of buff and to trim the carborundum stones used in them. In the case of high speed buffs the casting was manhandled and held waist-high against the revolving grinding agent. These buffs were fitted with exhaust apparatus, including hoods and ducts. Although this equipment was intended to draw off the sand and metal particles produced when castings were dressed by these buffs, it did not draw off all these particles. There were three plough buffs which were suspended by chains from a radial

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arm and were not fitted with any exhaust apparatus. To operate these plough buffs the revolving grinding agent was brought from above into contact with the casting to be dressed. In the operation of both types of buff the castings were "abraded by "the grindstone" which formed an essential part of the machine, and the purpose of that operation was to remove adherent and burned-on sand from the castings as well as metal excrescences. According to the appellant, substantial quantities of adherent and burned-on sand remained on the castings when they reached the plough buffs. He averred that, as a consequence of the operation of the buffs, he was exposed daily throughout his employment to breathing an atmosphere impregnated with fine particles of sand (which is largely composed of silica), as a result of which he contracted pneumoconiosis and had to give up work with the respondent company in February, 1951.

The facts are fully stated in the opinions of Viscount Simonds and Lord Morton of Henryton.

Gordon Stott Q.C. and *A. Johnson* (both of the Scottish Bar) for the appellant. The respondents caused or materially contributed to the appellant's disease by negligently failing to provide a dust extraction plant for the plough buffs or swing-frame grinders. They were also in breach of regulation 1 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, in that they carried on dry grinding, causing the evolution of dust in such a manner as to be inhaled by the appellant, without the use of adequate appliances to intercept it.

On the application of the regulation the relevant authority is *Bonnington Castings Ltd.* v. *Wardlaw*,[1] where the same regulation was being considered. The appellant is entitled to succeed because he has discharged the onus on him defined in that case. The present case is a fortiori that case, since here the appellant was actually operating the plough buffs, whereas in that case the workman was only incidentally exposed to their dust.

Five submissions are made: (1) On the evidence the Lord Ordinary was right in holding that there was exposure to dangerous dust. (2) If there was dangerous dust, the criterion is laid down by *Bonnington Castings Ltd.* v. *Wardlaw*.[1] (3) As to exposure, that case applies a fortiori. (4) If there had been an exhaust appliance to take away substantially all the dust, it would, on the evidence, have taken away the dangerous dust. (5) In any event, apart from the evidence, the regulation is dealing with inhalable dust, not dust in general; if the respondents failed to fit an appliance to deal with that dust, they are liable, since there is no point in fitting an appliance to deal with the non-dangerous dust but not the dangerous dust.

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[1] [1956] A.C. 613; [1956] 1 All E.R. 615.

The regulations are stringent and start with a definite prohibition against grinding where dust is evolved in such a way as to be inhaled by persons employed unless adequate appliances are in use for its interception. Cf. regulation 1 of the Grinding of Cutlery and Edge Tools Regulations, 1925.

A point which was raised by the respondents in the Inner House was that the appellant had not established that the carborundum grinding wheel was manufactured of abrasive similar to bonded emery so as to fall within the definition of "abrasive "wheel" in the regulations, and that, if this was not an abrasive wheel, the case did not fall within the regulations, because the operation did not fall within the definition of "grinding." If this process was not grinding, that was known to the respondents; it was for them to indicate it on their pleadings and prove it and not to sit back silent. The point was not taken by them in the Outer House and accordingly it was not open to them in the Inner House, since they were bound to give fair and adequate notice of the case which they intended to make. The respondents' pleadings admit that the plough buffs are used "for the "grinding of the outside surface of large castings." If, however, the point was open to the respondents, their argument is ill-founded. The evidence is sufficient to show that the wheel, which is admittedly of carborundum and therefore is not a "grindstone," is of a bonded material and has the abrasive qualities which, together with the bond, constitute its similarity to bonded emery so that it is an "abrasive wheel." "Car-"borundum" is defined at p. 157 of the Supplement to the Oxford English Dictionary. It is conceded that carborundum and bonded emery are chemically different from each other. The word "carborundum" was also used to describe the wheel in *Bonnington Castings Ltd.* v. *Wardlaw.*[1] The regulations were amended as recently as 1950 (Grinding of Metals (Miscellaneous Industries) (Amendment) Special Regulations, 1950), and it is to be supposed that no gap in them was then detected. If the evidence on this novel point is not sufficient, the appellant should have the opportunity of leading further evidence and the case should be remitted to the Court of Session to make further findings and report to the House of Lords: *James Brownlie & Son* v. *Barrhead Magistrates.*[2]

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[1] [1956] A.C. 613.

In *Wardlaw* v. *Bonnington Castings Ltd.*[3] the First Division rightly held that the definitions of " grinding " and " cleaning " of castings " were not mutually exclusive, and this was not challenged when that case came before the House of Lords on appeal. The appellant's work, whether or not it was cleaning, was grinding. This is in accordance with the object of the code, which is to protect the workmen against the danger caused by dust.

There was a causal connexion here between the breach and the injury. About half the appellant's time was spent in operating plough buffs. The court below did not pay sufficient attention to the fact that when plough buffs are equipped with an exhaust apparatus with a draught, the smaller air-borne particles (which cause the disease) are thereby deflected and tend to be sucked into the exhaust. The dangerous dust, which continued throughout the appellant's employment, contributed to his disease to a degree which cannot be regarded as negligible but must have been the most substantial factor in his incapacity, since the other machines were properly safeguarded.

Apart from the statute, however, the respondents are liable for negligence, since, once the danger of the dust is known, it is obviously necessary to take reasonable precautions. This danger should have been known to the respondents as reasonably prudent employers. Admittedly, there is no general practice of equipping plough buffs with exhaust appliances, but it is an obvious necessity and there is an obvious duty to protect workmen against inhalation of dangerous dust. Though knowledge on this subject is incomplete, it is sufficient to make it incumbent on employers to take all reasonably practicable precautions. The respondents should have foreseen the serious harm which would probably result to the appellant from failure to provide an exhaust appliance, and that is enough, even if the precise event could not be foreseen. The risk was very serious and the respondents were not exonerated from taking this precaution. So also with respirators, which were not provided. If they were available they should have been used: see *Crookall* v. *Vickers-Armstrong Ltd.*,[4] *Gregson* v. *Hick*

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[2] 1925 S.C.(H.L.) 41.

[3] 1955 S.C. 320.

[4] [1955] 1 W.L.R. 659, 664; [1955] 2 All E.R. 12.

Hargreaves & Co. Ltd.[5] and *Balfour* v. *William Beardmore & Co. Ltd.*[6]

The House need not be reluctant to give effect to its own view of the evidence, since the dispute depends on inference and not on credibility.

Ian Shearer Q.C. and *G. Emslie* (both of the Scottish Bar) for the respondent company. As to the appellant's common law claim, a person who claims that specific safety devices should have been used must demonstrate by proof that the necessity for their provision was so serious that the omission to provide the device was inexcusable to the extent of folly: *Morton* v. *William Dixon Ltd.*[7]; *Paris* v. *Stepney Borough Council*[8]; *Gallagher* v. *Balfour, Beatty & Co. Ltd.*[9]; *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.*[10] and *Carmarthenshire County Council* v. *Lewis.*[11] What Lord Porter said in *Morris's* case[12] as to imprudence or unreasonableness does not necessarily represent the law of Scotland. Even if it be correct that it is enough for the appellant to show that the respondents could see that serious harm would follow from omission to provide safety appliances, that does not affect the respondents on the evidence. The court was against the sweeping propositions submitted in *Gregson* v. *Hick Hargreaves & Co. Ltd.*[13]

So far as the common law point is concerned, there are findings of fact directly in the respondents' favour and against the appellant by the Lord Ordinary and the judges of the First Division. The House of Lords should be slow to differ from them.

Until 1950 or 1951 it was not thought either in the industry or by skilled independent observers that iron dressers such as the appellant were exposed to danger by inhalation. No exhaust appliance for plough buffs was available on the market until 1950.

On the approach in *Morton* v. *William Dixon Ltd.*[14] it cannot be said, in view of the general practice in the industry, that it was folly not to provide safety devices. On the approach in *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.*[15] it cannot be said that there was an obvious risk with obviously serious consequences. The precautions desiderated must be shown by the person who requires them to be such as would have prevented the damage of which complaint is made, i.e., would have prevented either the disease or its aggravation. The appellant has not proved that there was any extractor in existence at the material time which would have been so efficient as to have removed all free silica. As to the provision of respirators, one must go on the evidence in each particular case: see *Balfour* v. *William Beardmore & Co. Ltd.*[16]

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[5] [1955] 1 W.L.R. 1252, 1268; [1955] 3 All E.R. 507.

[6] 1956 S.L.T. 205, 211.

[7] 1909 S.C. 807.

[8] [1951] A.C. 367, 382, 387; [1951] 1 All E.R. 42.

[9] 1951 S.C. 712, 718, 719.

[10] [1956] A.C. 552, 557, 570, 576, 578; [1956] 1 All E.R. 385.

[11] [1955] A.C. 549, 571; [1955] 1 All E.R. 565.

[12] [1956] A.C. 552, 568.

[13] [1955] 1 W.L.R. 1252, 1265.

[14] 1909 S.C. 807.

[15] [1956] A.C. 552.

A reasonably prudent and careful employer, conversant with the state of knowledge in the iron foundry industry during the appellant's employment, would not have appreciated that the appellant was exposed to the risk of pneumoconiosis. It was not the practice to provide masks or respirators, and it was not proved that they were obviously necessary. Nor was it proved that the appellant's disease was caused or aggravated by any breach of common law duty by the respondents.

As to the regulations, the appellant did not establish that there was a failure of the respondents to comply with them, which materially contributed to his incapacity. The regulations were not specifically directed to the iron or steel industry, nor to the suppression of any particular kind of dust, including free silica. What they do cover is several defined processes. In particular, regulation 1 is not directed to plough buffs or the protection of those who operate them.

It is submitted: (1) It was not proved by the appellant that the work on which he was engaged was "grinding" within the regulations, and so he cannot say that there is a breach of regulation 1. (2) If the regulations apply, he has failed to prove that the provision of the appliances desiderated by them would have prevented the aggravation of his disease during the relevant period from 1942 to 1951. (3) The work which he was doing at the plough buffs was "cleaning" of castings as defined in the regulations and not "grinding" as defined, and so regulation 1 does not apply.

As to the first point, it was not sprung suddenly on the appellant. Before the Lord Ordinary the respondents were entitled to sit quiet and leave the appellant to prove his case. A carborundum wheel is admittedly "grinding" in the ordinary sense, but the onus is on the appellant to show that it is "grinding" within regulation 1. No operation is "grinding" in that sense unless it is carried out "by means of a grindstone or

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[16] 1956 S.L.T. 205, 211–212.

"abrasive wheel," and each of these is given a strictly limited meaning by the definition of them. A carborundum wheel is not within either definition. It is not a "grindstone," because it is not made of sandstone, and it is not an "abrasive wheel," because it has not been proved that carborundum is similar to bonded emery. In the Inner House the respondents were entitled to open the whole case de novo and take this point for the first time. The onus was on the appellant in limine to prove that the abrading agent was an "abrasive wheel" within the regulations. In his pleadings he referred to it as a "carborundum" wheel and a "grindstone" but never as an "abrasive wheel." On the evidence he failed to discharge the onus. Counsel for the appellant did not move in the Inner House to have the matter remitted for further evidence, and it is too late to ask now. There is no trace of such a motion on the motion sheet. Further, one cannot make good a deficiency in one's own proof by reference to one's opponent's written pleadings unless they make a clean admission which is accepted by the other side: see *Lee* v. *National Coal Board.*[17] "Grinding," which is very strictly defined, is not just the abrasion of metal but the abrasion by a particular kind of stone or wheel. So, even if one has a piece of metal which has been nowhere near sand and applies to it a "grindstone" or "abrasive wheel," regulation 1 applies; but if one has a piece of metal covered with sand, and one abrades it to get the sand away without using a "grindstone" or "abrasive "wheel" as defined, regulation 1 does not apply. At the date of the regulations the fear was of the free silica content of the natural mineral of which the grindstone or abrasive wheel was composed. A metal wheel loaded with sandstone would not be within the regulations so as to demand exhaust appliances. The regulations are not guarding against free silica arising from abraded sand. If the only link required by the regulations was the link of abrasion, there would be no need for the definitions.

As to the second point, assuming that the regulations apply, they are complied with if a substantial part of the dust is intercepted: see *Wardlaw* v. *Bonnington Castings Ltd.*[18] The appellant failed to establish that the aggravation of his disease was materially contributed to by the respondents' failure to comply with the regulations in respect of the plough buffs, and there are no positively proved facts from which such an inference could be drawn. The findings of the First Division are sound in fact and law.

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[17] 1955 S.C. 151.

[18] 1955 S.C. 320, 326, 334, 345.

As to the third point, the appellant was cleaning castings and therefore he was not grinding, whatever sort of grindstone or wheel he was using. The distinction between "cleaning of castings" and "grinding," as defined, runs through the regulations. Accordingly, the operation was one to which regulation 1 does not apply.

Gordon Stott Q.C. in reply. The respondents were guilty of "folly" within the meaning of Lord Dunedin's words in *Morton* v. *William Dixon Ltd.*[19] As to what was said in *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.*[20] by Lord Porter, there is no difference between the law of Scotland and the law of England: see *per* Lord Reid.[21] See also *Gregson* v. *Hick Hargreaves & Co. Ltd.*[22] In view of the danger of lung disease the employer must protect his employees against the dangerous dust by means of extractors and respirators. On the evidence, if the respondents had dealt with the visible dust they would also have dealt with the invisible dangerous dust. The appellant is not founding on *Balfour* v. *William Beardmore Ltd.*[23] to show that the masks available were fully efficient, but to show the obvious folly of not providing masks if the danger is known and the masks available are reasonably satisfactory.

As to the point whether a carborundum wheel is an abrasive wheel, it would be unsatisfactory if the matter were to be decided on some controversy between counsel as to what happened in the Inner House. If leave to call further evidence was not asked for, it is hard to see why *James Brownlie & Son* v. *Barrhead Magistrates*[24] was cited. Such an application if made in the course of the hearing would not appear in the motion sheet.

Under the regulations a plough buff must not be used unless there is a machine which will take away substantially the dust which the workers might breathe. As to exemptions, see the certificates of exemption at the end of the regulations.

Their Lordships took time for consideration.

March 14. VISCOUNT SIMONDS. My Lords, this appeal has raised questions which to me at least have appeared to be of peculiar difficulty. It concerns the obligations of ironfounders to their workmen both at common law and under the regulations made under the Factories Act, 1937. The present appellant is a victim of that fell disease, pneumoconiosis, and he claims that he has contracted it, or that at least it has been aggravated, by reason of the respondents' disregard of their obligations at their iron foundry at Kirkintilloch where he was employed by them from 1942 to 1951.

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[19] 1909 S.C. 807, 809.
[20] [1956] A.C. 552, 568.
[21] Ibid. 575.
[22] [1955] 1 W.L.R. 1252, 1265.
[23] 1956 S.L.T. 205.
[24] 1925 S.C.(H.L.) 41.

I will very briefly describe the process in the course of which the events happened that give rise to the appellant's claim. At the respondents' foundry iron castings are cast in sand in moulding boxes. They are then knocked out and most of the sand removed in the moulding shop. They are next taken to the dressing shop where the appellant worked and there the superfluous metal consisting largely of excrescences known as "risers" or "fins" and any still adherent sand are removed. This operation is carried out in a number of ways, but here we are concerned only with the removal by means of a grinding machine called a "plough buff." It consists of a frame suspended from a radial arm hinged at one end to a vertical girder. The outer end of the radial arm is supported by a triangular frame running on wheels in the arc of a circle formed by the movement of the radial arm. The suspended frame contains a carborundum grinding wheel driven by an electric motor. The casting having been brought to the plough buff, the workman adjusts the wheel over the stub of the riser or fin which is to be removed and presses down on handles so as to bring it to bear on the casting. In the ensuing process of grinding a quantity of dust is thrown off partly from the carborundum wheel, partly from the metal casting and partly from the sand which still adheres to the casting. It is with dust caused by the disintegration of the sand that this case is concerned: for it is common ground that it is by the fine and invisible particles of siliceous sand that pneumoconiosis is caused.

The appellant's ground of complaint at common law is that the respondents were negligent in that (a) they did not equip their plough buffs with exhaust appliances to remove the dust, and (b) that they did not supply their workmen operating the plough buffs with respirators, and that by their negligence they caused or at least contributed to the appellant's disease.

It was proved or admitted at the hearing that the respondents did not supply either exhaust appliances or respirators, and it was also, as it appears to me, proved that in the process of grinding by the plough buffs a quantity of dust was thrown up into the air in the immediate neighbourhood of the workmen and that this dust consisted of or contained the dangerous siliceous particles. The question, then, is whether the respondents have been guilty of neglect at common law in that they have (to adopt the test laid down by Lord Dunedin in *Morton* v. *William Dixon Ltd.*[1]) failed to do something which was commonly done by other persons in like circumstances or ignored a precaution so obviously required that it would be folly in anyone to neglect it.

My Lords, on this question the Lord Ordinary, Lord Guthrie, and the Lord President, Lord Carmont, and Lord Russell, on appeal from him, were unanimously of opinion that on the facts of the case negligence at common law had not been proved, and I am not prepared to differ from them. I do not think it necessary to rehearse the evidence which was carefully examined by them.

The second and more difficult question arises on the regulations. They are the Grinding of Metals (Miscellaneous Industries) Regulations, 1925. First I refer to the relevant definitions, which are as follows: " *Grindstone* means a grindstone composed of " natural or manufactured sandstone, but does not include a " metal wheel or cylinder into which blocks of natural or manu- " factured sandstone are fitted. *Abrasive Wheel* means a wheel " manufactured of bonded emery or similar abrasive. *Grinding* " means the abrasion by aid of mechanical power, of metal, " article of metal, or part of any article of metal by means of a " grindstone or abrasive wheel. . . . *Cleaning of castings* means " the freeing of castings from adherent sand or other substance, " and includes the withdrawal or knocking out of cores, core rods " and lifters, the removal of ingates, risers or other projections " or excrescences, and the general smoothing of the castings."

Of the regulations themselves I need refer only to the first, which is as follows: " No racing, dry grinding, or glazing ordinarily " causing the evolution of dust into the air of the room in such " a manner as to be inhaled by any person employed shall be " performed without the use of adequate appliances for the inter- " ception of the dust as near as possible to the point of origin " thereof, and for its removal and disposal so that it shall not " enter any occupied room, and for the purpose of this regulation " the appliances shall not be deemed adequate unless they either " include—(*a*) a hood or other appliance, so constructed, arranged, " and placed as substantially to intercept the dust thrown off; " and (*b*) a duct of adequate size, air tight and so arranged as to " be capable of carrying away the dust . . . and (*c*) a fan or " other efficient means of producing a draught sufficient to extract " the dust; or are such as, in the case of the particular factory

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[1] 1909 S.C. 807.

"or part thereof, or of the particular manufacture, process or "operation in or for which they are used, shall be proved to be "at least as effectual for such interception, removal and disposal "as such hood, duct and fan would be."

Upon this regulation a number of questions arise, the respondents contending in the first place that it is not applicable to their operations at all, and in the second place that, even if it is, they have not committed a breach of it, and in the third place that in any event the appellant has not proved that he suffered any damage by reason of the breach.

Under the first head two points are taken. It is said and it was held by Lord Guthrie that the operation came within the description of "cleaning of castings" as defined in the regulations, and that the requirements of "grinding" and "cleaning of "castings" were mutually exclusive and that therefore regulation 1 did not apply. After Lord Guthrie had so decided, the First Division of the Court of Session decided in another case (*Wardlaw* v. *Bonnington Castings Ltd.*[2]) that this was wrong and that the two definitions were not mutually exclusive. This decision was given before the instant case reached the Inner House. The respondents therefore were content to reserve the point for argument in this House. They have argued it accordingly, but, for my part, I am content to say that the First Division were clearly right in *Wardlaw's* case[2] and to accept their reasoning and conclusion.

The second point under the first head was this. The respondents contended that the operation in question did not fall within regulation 1 on the ground that the abrading wheel, which, as already stated, was made of carborundum, was neither a "grind-"stone" nor an "abrasive wheel" within the meaning of the regulation. This point has a curious history. I will say no more than that it was not taken in the pleadings and that it would require a very astute mind to discover that it was implicit in the defenders' general denial. It was not taken at the hearing before the Lord Ordinary, which proceeded throughout upon the footing that the process was "grinding" within the regulation, counsel and witnesses on both sides referring to it as grinding and to the machine as a grindstone. It may, nevertheless, be that it was open to the respondents to take the point for the first time upon appeal. But I have come to the conclusion that the point is not a sound one and I have come to this conclusion without any

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[2] 1955 S.C. 320.

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further evidence though, if it were necessary, I should not, in the circumstances, have hesitated to remit the case in order that further evidence might be obtained.

"Dry grinding" being the "abrasion . . . of metal . . . by "means of a grindstone or abrasive wheel," the appellant must show that the abrading wheel falls within the definition of "grindstone" or of "abrasive wheel" in the regulations. Clearly it is not within the definition of "grindstone," for it is composed neither of natural nor of artificial sandstone. Is it, then, "a wheel manufactured of bonded emery or similar "abrasive"? I cannot agree with the learned judges of the First Division that it is not. It is true that nothing more was proved or admitted than that the wheel is made of carborundum —a silicon carbide—which is in some way bonded and that it has an abrasive function, but it appears to me that no more is necessary to show that it is an abrasive similar to bonded emery. It is, as has been said, a narrow point. But although it was conceded that for some little time carborundum has been in common and, indeed, almost universal use, it never appears to have been doubted that it fell within the regulation.

Having formed the opinion that the operation of grinding by a machine which I will continue to call a "plough buff" is within the regulation, I turn to the question whether the respondents have been guilty of a breach of it.

It must first be observed that the regulation is in its terms absolute. No suggestion was made in this case that the machine was of a type for which exemption had been given. The respondents were therefore absolutely prohibited from working the machine so as to cause "the evolution of dust into the air of the "room in such a manner as to be inhaled by any person employed ". . . without the use of adequate appliances for the intercep- "tion of the dust as near as possible to the point of origin "thereof, and for its removal," and so on. But the prohibition, though so far absolute, is modified by the following provision which must, I think, have a positive as well as a negative effect. It is that for the purpose of the regulation the appliances shall not be deemed "adequate" unless they include (*a*) a hood or other appliance so constructed, arranged and placed as substantially to intercept the dust thrown off, and (*b*) a duct, and (*c*) a fan, as therein respectively described or are such as to satisfy the other conditions therein mentioned. It is clear, as I say, that there would be no breach of the regulation if the respondents had, in connexion with their plough buffs, used such appliances as complied with the provision that I have just stated. And I conceive that in regard to this provision there might be some controversy as to what in a quantitative sense was meant by the words "substantially to intercept." But in fact no such question can arise in the present case, for not only was no effective intercepting appliance used by the respondents, no such appliance was used at all. It was established that the heavy particles of dust were flung off horizontally to the back of the frame of the buff but that the lighter particles, including the dangerous and invisible particles, of silica dust get carried round with the action of the wheel and rise vertically into the air. This is the dust which is evolved into the air and is liable to be inhaled by a person employed in the shop. It is the dust to which, as was proved by ample evidence, the appellant was continuously in greater or less degree exposed and it is the dust against which the respondents did not provide any safeguards whatever.

In these circumstances, I cannot doubt that the respondents have been guilty of a breach of the regulation. It is irrelevant whether they knew or ought to have known of the danger to which the workman was exposed, and equally irrelevant whether there was any effective and practical remedy and, if so, whether the respondents knew, or ought to have known, of it. These were questions of vital import in determining whether there was negligence at common law, but they were not relevant to the question whether or not there has been a breach of the regulation.

The final question is whether the appellant has established a causal connexion between the breach and the damage suffered by him. As was held in this House in *Bonnington Castings Ltd.* v. *Wardlaw*,[3] that is what he must show. "Post hoc, ergo "propter hoc" is a fallacy in respect of a breach of a statutory regulation as it is in respect of any other event in life. The question is whether the evidence shows that the breach caused or made a material contribution to the atmospheric conditions to which the appellant's illness was due or by which it was aggravated. For the purpose of deciding this question it was determined in the same case that a contribution is material unless the maxim "de minimis non curat lex" can be applied to it.

My Lords, upon this question there has been a difference of opinion in the courts below. I quote Lord Russell as expressing in clearest terms the view that the appellant had not proved his case[4]: "On the weight of the relevant evidence I am

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[3] [1956] A.C. 613; [1956] 1 All E.R. 615.

[4] 1956 S.C. 224, 240–241.

"accordingly satisfied that no substantial quantity of dangerous "sand is proved to have been emitted into the air of the dressing "shop from the plough buffs; and that any such dust as was "incidentally emitted neither caused nor contributed to the "aggravation of the pneumoconiosis by which the pursuer "became incapacitated." The Lord President had expressed himself in similar terms and Lord Carmont had agreed. On the other hand, the Lord Ordinary, after a careful review of the evidence, sums the matter up in a passage which I must quote at some length[5]: "In the course of the removing of fins and "risers a certain amount of siliceous dust is thrown off into the "atmosphere. . . . Although the wheel of a plough buff grinds "on the underside of its rim, and the particles of metal and "carborundum thrown off in the process are projected away from "the operator towards the steel screen, siliceous dust is released "into the atmosphere about the operator. The effect of the "heat applied to the castings in the process of moulding is to "render the sand brittle. As a little of the sand is still adherent "to the casting about the risers when the casting is brought to "the plough buff, during the process of removing the risers, this "brittle sand is ground down to small particles of dust. Some "of the particles of dust are visible in the atmosphere, especially "when rays of sunlight fall on them. Other particles are "dangerous to the health of the operator, since, if they are "inhaled over a prolonged period, they cause irritation in the "lungs, which produces the condition called pneumoconiosis. The "pursuer's working day was from 7.15 a.m. until 5 p.m., with "a break of one hour. His work involved his exposure to the "danger of pneumoconiosis, since he had throughout his working "day, and especially when working at a plough buff, to breathe "an atmosphere which contained these invisible particles of "siliceous dust." I have cited this passage, though many of the facts stated in it have already appeared in the course of this opinion, because it appears that every word of it is amply justified by the evidence. I regret that I must come to a conclusion of fact different from that of the learned judges of the First Division, but having read and re-read the evidence, I prefer the view of it which was taken by the Lord Ordinary. He had at least some advantage in seeing and hearing the witnesses, though their candour and credibility may not have been in issue, and his evaluation of their testimony agrees with my own upon a consideration only of the written word. This leads to the inevitable

[5] 1957 S.L.T. 2, 4.

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conclusion that the pursuer proved the last thing he had to prove, a relevant causal connexion between the respondents' breach of the regulation and his own disease. In my opinion, therefore, this appeal should be allowed. The Lord Ordinary indicated that, had he taken a different view on the merits, he would have awarded £4,000 to the appellant. This was not challenged before the First Division. The appellant is, therefore, entitled to judgment for £4,000. The respondents must pay the appellant's costs of this appeal and in the courts below.

LORD OAKSEY. My Lords, I have had the advantage of reading the speech of my noble and learned friend on the Woolsack and I agree with it.

LORD MORTON OF HENRYTON. My Lords, this appeal arises out of an action for damages which was brought by the appellant against the respondents. The respondents have an iron foundry at Kirkintilloch called the "Star Foundry," and the appellant was employed there from 1942 to February, 1951. In February, 1951, he was found to be suffering from pneumoconiosis. As is now well known, the development of this disease is slow and gradual and results from the inhalation of minute invisible particles of silica dust. The appellant gave up his employment on February 24, 1951, and has not since been employed. The appellant claims that this disease was contracted or aggravated in the course of his employment by the respondents, owing to their negligence and to their breach of regulation 1 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925.

The appellant was 59 years of age when he brought this action. As a youth he was employed in the respondents' iron works for a short period. He became a pit-head worker and later an oncost worker in a mine for about three years. Next he worked in a sand quarry, and then served in the army during the first world war. After his demobilization he was a casual labourer for about four years. From about 1926 to 1931 he was employed by the Forth and Clyde Foundry in Kirkintilloch. During that period his work consisted of buffing steel castings with a machine and dressing castings with a hammer and chisel. Between 1931 and 1942 he was for a time unemployed during the industrial depression, and at other times worked in employments which are immaterial for the purposes of this action. On his return to the Star Foundry in 1942 he worked in the dressing shop and

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he continued the same work till February, 1951. The findings of the Lord Ordinary (Lord Guthrie) as to the work on which the appellant was engaged during this period, and the extent to which it exposed him to the risk of inhaling dust, were as follows [6]:

" In the shop castings which have come from the furnace in " the moulding shop are dressed. In the process of casting the " metal is cast in sand in a moulding box, and great heat is then " applied. When the moulding box is removed from the furnace " the casting is turned out of the moulding box, and most of the " sand comes away from the casting when the box is emptied or " ' knocked out.' Thereafter a lighter casting will be placed in " a container called a rumbler so that adhering sand may be " removed by revolving the rumbler. A heavier casting will be " taken to a brushing-off table so that adhering sand can be " brushed off with steel brushes. After a casting has been made " and has been taken from the moulding box, rough pieces of " metal project from it. The projections on some castings are " known as ' fins ' and on others as ' risers.' Even after " rumbling or brushing a little sand may still adhere to the " castings at these fins or risers. The fins and risers are removed " by grinding machines called ' buffs.' In the dressing shop " there were four double-wheel grinding machines or high-speed " buffs, which were on fixed foundations, and which had double " wheels of carborundum. The casting was held against these " high-speed buffs, and the grinding wheels abraded the fins. To " the high-speed buff were attached a hood, a duct, and a fan " for the purpose of carrying away the particles of metal and " sand removed by the process from the casting. There were " also three ' plough buffs ' or swing-frame grinding machines. A " plough buff was suspended by chains from a horizontal overhead girder. One end of this girder was hinged to a fixed " vertical girder. The other end rested upon a triangular " support at the base of which were two wheels. The wheels " enabled the overhead horizontal girder, and with it the plough " buff, to move horizontally in an arc. The plough buff could " also be moved backwards and forwards by its attachment to " the horizontal girder. The plough buff consisted of a horizontal " steel arm or frame with a casing containing a carborundum " wheel at the end nearest the triangular support. At the other " end of the frame was an electric motor, which drove the wheel " by means of a belt. The plough buff was used to remove " ' risers,' projections above the rim of circular castings. The

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[6] 1957 S.L.T. 3-4.

"casting was placed upon a table, and the buff, suspended by "its chains, was brought to the required position above the "casting, so that the rim of the carborundum wheel was above "the riser which had to be abraded. The operator, standing "near the wheel, held two handles which enabled him to apply "the wheel to the riser. Behind the machine was placed a "steel partition to catch particles of metal removed from the "casting and particles of carborundum worn away in the "operation of the wheel. No dust extraction plant was attached "to the plough buff.

"The pursuer's work was to operate the high-speed buffs "and plough buffs, and his time was, roughly, evenly divided "between the two types of machine. In the course of the "removing of fins and risers a certain amount of siliceous dust "is thrown off into the atmosphere. Even in the operation of "high-speed buffs this dust is created, and it is not all removed "by the hood, duct and fan with which a high-speed buff is "equipped. Although the wheel of a plough buff grinds on "the underside of its rim, and the particles of metal and "carborundum thrown off in the process are projected away "from the operator towards the steel screen, siliceous dust is "released into the atmosphere about the operator. The effect "of the heat applied to the castings in the process of moulding "is to render the sand brittle. As a little of the sand is still "adherent to the casting about the risers when the casting is "brought to the plough buff, during the process of removing "the risers, this brittle sand is ground down to small particles "of dust. Some of the particles of dust are visible in the atmosphere, especially when rays of sunlight fall on them. Other "particles are dangerous to the health of the operator, since, if "they are inhaled over a prolonged period, they cause irritation "in the lungs, which produces the condition called pneumoconiosis. The pursuer's working day was from 7.15 a.m. until "5 p.m., with a break of one hour. His work involved his "exposure to the danger of pneumoconiosis, since he had "throughout his working day, and especially when working at "a plough buff, to breathe an atmosphere which contained these "invisible particles of siliceous dust."

It is convenient at this point to set out regulation 1 of the 1925 regulations already mentioned: "No racing, dry grinding, "or glazing ordinarily causing the evolution of dust into the "air of the room in such a manner as to be inhaled by any person "employed shall be performed without the use of adequate

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"appliances for the interception of the dust as near as possible "to the point of origin thereof, and for its removal and disposal "so that it shall not enter any occupied room, and for the "purpose of this regulation the appliances shall not be deemed "adequate unless they either include—(*a*) a hood or other "appliance, so constructed, arranged, and placed as substantially "to intercept the dust thrown off; and (*b*) a duct of adequate "size, air tight and so arranged as to be capable of carrying "away the dust, . . . provided with proper means of access for "inspection and cleaning, and, where practicable, with a con-"nexion at the end remote from the fan to enable H.M. Inspector "of Factories to attach thereto any instrument . . .; and (*c*) a "fan or other efficient means of producing a draught sufficient "to extract the dust; or are such as, in the case of the particular "factory or part thereof, or of the particular manufacture, pro-"cess or operation in or for which they are used, shall be "proved to be at least as effectual for such interception, removal "and disposal as such hood, duct and fan would be."

The Lord Ordinary held that "the seeds of the trouble were "sown" far back in the appellant's industrial career but that his exposure to dust in the employment of the respondents aggravated his condition and was a cause of his incapacity. The Lord Ordinary held, however, that the appellant had failed to prove negligence on the part of the respondents and that regulation 1 of the 1925 regulations did not apply to the present case. He expressed his reasons as follows[7]: "According to "all the evidence in the case, the work upon which the pursuer "was engaged was the removal of risers by means of the "plough buff. It was, therefore, one of the processes specifically "included within the scope of the definition of 'cleaning of "'castings.' The terms of the regulations, and in particular "regulations 7 and 10, making different provision for the cleaning "of rooms in which grinding is carried on from the requirement "for cleaning of rooms in which cleaning of casting is done, show "that 'grinding' and 'cleaning of castings' are mutually exclu-"sive. For these reasons I hold that regulation 1 does not apply, "and, therefore, that the pursuer's case of breach of statutory "duty by the defenders has failed." The Lord Ordinary, therefore, assoilzied the respondents but intimated that if he had decided in favour of the appellant he would have granted decree for £4,000 damages.

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[7] 1956 S.C. 224, 227.

On appeal to the First Division the appellant's counsel did not seek to support the Lord Ordinary's decision on the ground which had found favour with him, for immediately after that decision was given the First Division, in the case of *Wardlaw* v. *Bonnington Castings Ltd.*,[8] had held that work of this kind was both "grinding" and "cleaning of castings" and that the two operations were not mutually exclusive. This case came to your Lordships' House.[9] The point now under discussion was not, however, raised in your Lordships' House; thus it remained open to the respondents in the present case, and was relied upon by their counsel in argument before this House.

In the present case the learned judges of the First Division agreed with the view of the Lord Ordinary that the appellant's disease had been aggravated to the point of incapacity by his work with the respondents, and counsel for the respondents did not seek to contend to the contrary in this House. The First Division also agreed with the Lord Ordinary that the appellant had failed to prove negligence at common law on the part of the respondents. They were prepared to assume, without so deciding, that regulation 1 of the 1925 regulations did apply to the present case and they did not doubt that the respondents had failed to comply with it, but they held that the appellant had failed to prove that the respondents' failure to comply with the regulation had materially contributed to the appellant's incapacity. The appeal was, therefore, dismissed.

The result is, my Lords, that the questions now arising for decision are: (1) Were the respondents guilty of negligence at common law? (2) Did regulation 1 of the 1925 regulations apply to the present case? If so, counsel for the respondents did not seek to contend that they had complied with it. (3) Did the appellant prove that the respondents' failure to comply with the regulation had materially contributed to his incapacity? I turn now to the first of these questions.

In the present case the faults alleged against the employers are that they did not equip their plough buffs with exhaust appliances to remove the dust and they did not provide the operators of the buffs, and in particular the plough buffs, with respirators. These are faults of omission, and I quote again the oft-quoted words of Lord President Dunedin in *Morton* v. *William Dixon Ltd.*[10]: "I think it is absolutely necessary that "the proof of that fault of omission should be one of two kinds,

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[8] 1955 S.C. 320.

[9] [1956] A.C. 613.

[10] 1909 S.C. 807, 809.

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"either to show that the thing which he did not do was a thing "which was commonly done by other persons in like circum"stances, or to show that it was a thing which was so obviously "wanted that it would be folly in anyone to neglect to provide "it."

Mr. Stott, for the appellant, rightly conceded that there is no evidence of a general practice in the industry to provide either of these safeguards, but he submitted that the provision of one or other of them was a precaution so obviously required that it was folly on the part of the respondents to omit it.

My Lords, on this first question the respondents have concurrent decisions of the Lord Ordinary and the First Division in their favour. The evidence has again been carefully scrutinised in this House and the question has been fully and ably argued. I do not think it necessary to detain your Lordships with a review of the evidence and arguments, as I am satisfied that there is no good reason for reversing the decision of the courts in Scotland on this point.

Before dealing with the second question I must set out the relevant definitions in the 1925 regulations. They are as follows: [His Lordship read the definitions of "grindstone," "abrasive wheel," "grinding" and "cleaning of castings" and continued:] Relying upon these definitions, Mr. Shearer, for the respondents, submitted (*a*) that the appellant had failed to prove that the work on which he was engaged was "grinding" within the meaning of regulation 1; (*b*) that the work on which the appellant was engaged was "cleaning of castings" within the meaning of the definition already quoted; that the processes of "grinding" and "cleaning of castings" are mutually exclusive; and therefore regulation 1, which relates only to grinding, does not apply to the present case.

Mr. Shearer's argument in support of his first submission on this question may be summarized as follows. He concedes that the operation carried on at the plough buffs might well be "grinding" in the ordinary sense of that word; but he pointed out that the burden is on the appellant to prove that it is "grinding" within the meaning of regulation 1 and no operation is "grinding" within that regulation unless it is carried out "by "means of a grindstone or abrasive wheel." See the definition of grinding already quoted. Moreover, the words "grindstone" and "abrasive wheel" are given a strictly limited meaning by the further definitions already quoted. It is common ground in this case that the wheel employed in the respondents' plough buffs is made of carborundum and not of "natural or manu- "factured sandstone." Therefore, says Mr. Shearer, it is not a "grindstone" within the definition. Mr. Stott agrees. Further, says Mr. Shearer, "abrasive wheel" is defined as "a "wheel manufactured of bonded emery or similar abrasive," and it has not been proved by any evidence that carborundum is an abrasive "similar to" bonded emery.

My Lords, there is no hint of this particular argument in the pleadings, but in his condescendence 4 the appellant avers that the work done by him at the plough buffs was dry grinding within the meaning of the 1925 regulations, and this averment is met by a denial and a reference to the regulations for their terms. Thus the burden was placed upon the appellant to prove this averment. It is quite clear, however, that the argument now under consideration was never put to the Lord Ordinary. In fact, both counsel for the respondents frankly stated that the point had not at that time occurred to them. Indeed, it does not appear to have occurred to the parties concerned in any case since the 1925 regulations came into force, although carborundum wheels have commonly been employed for many years past. In these circumstances, no evidence was directed to this issue before the Lord Ordinary.

The argument was, however, put to the First Division and all the learned judges of that Division found it an argument of weight. The Lord President said[11]: "The pursuer's counsel, "while unable to state whether he regarded carborundum as "falling within the definition of 'grindstone' or 'abrasive wheel,' "appeared to resent this point being taken without the defenders "having specifically averred in their defences that carborundum "fell within neither of the definitions. It was, however, in my "view a matter for him to prove, and not for the defenders to "disprove. He was afforded an opportunity of amending in "order to make a proper averment of what carborundum was. "This he refused to do. The matter, therefore, must rest on "the evidence as it stands. Had it been necessary to determine "the point I should have felt unable to hold that merely to "prove that the wheel was made of carborundum meant that it "was either a grindstone or an abrasive wheel, as defined in the "regulations. For these definitions are narrowly drawn and "subject to qualifications which may well exclude carborundum. "It would, however, be unfortunate to decide this case on such

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[11] 1956 S.C. 224, 234–235.

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"an issue, and it is not, in my view, necessary to do so. I shall "assume that the carborundum wheel is for the purposes of the "regulations a grindstone or an abrasive wheel. For, in my "view, there is another consideration which entitles the defenders "to absolvitor on this question in regard to regulation 1." Lord Carmont agreed and Lord Russell, after referring to the evidence, said [12]: "There is thus nothing to show that carborundum is "either sandstone or emery or similar abrasive. In that situa-"tion it is apparent that the pursuer has failed to prove affirma-"tively—as he was, in the absence of admission, bound to do—"that his work at the plough buff was 'dry grinding' as defined "by the regulations, and that the defenders were bound to "provide the exhaust appliance thereat whose absence is founded "on as a statutory breach of duty."

My Lords, I, too, am much impressed by the argument, and the question is, of course, a vital one in this case. For if the appellant cannot satisfy your Lordships that a wheel manufactured of carborundum is "a wheel manufactured of bonded "emery or similar abrasive," he has failed to prove that regulation 1 applies in the present case. It is plain that the only grinding which comes within regulation 1 is grinding by means of a wheel manufactured of certain specified materials. The obvious inference is that the framers of the regulation attached great importance to the material whereof the wheel was composed, and thought that the workmen needed protection against dust only if the wheel were composed of (1) natural or manufactured sandstone or (2) bonded emery or (3) abrasive material similar to bonded emery. Not, be it observed, "similar to "sandstone or bonded emery"; the abrasive must be similar to bonded emery, or regulation 1 does not apply. What, my Lords, is the meaning of the word "similar" in this context? It cannot mean "similar in function," for the function of every abrasive is to abrade, whether it be bonded emery or any other abrasive, and the words used are "or similar abrasive," not "or "other abrasive." "Similar" must therefore mean that an abrasive, to come within the definition, must have some quality or qualities *as a material* which it possesses in common with bonded emery. In the absence of expert evidence directed to this particular point, I am unable to say whether carborundum possesses any such qualities, and Mr. Stott conceded that the chemical composition of the two materials is different.

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[12] 1956 S.C. 224, 239.

It follows that, on the evidence as it stands, the appellant has, in my opinion, failed to prove that regulation 1 applies in the present case; but if further evidence were called, new light might be thrown upon the matter, and your Lordships would then have to consider whether, in the light of any similarities in the two materials revealed by such evidence, carborundum was or was not a "similar abrasive" to bonded emery, within the meaning of the definition.

I should be very reluctant to dismiss this appeal on the ground that the appellant has failed to prove this similarity, since this point was not specifically raised in the pleadings and no one of the counsel appearing before the Lord Ordinary had it in his mind.

Mr. Stott asked your Lordships, if you were not satisfied on this point, to remit the cause to the Court of Session with a direction to allow the parties to call further evidence, to make findings thereon, and to report these findings to this House. He explained that he did not accept the First Division's offer of an opportunity to amend because he did not desire to amend his pleadings, but to call fresh evidence to prove his allegation in condescendence 4, which I have already quoted.

My Lords, if the matter rested with me I would accede to Mr. Stott's application. A similar remit has been made in other cases, for instance, on December 6, 1923, in the case of *Vitruvia S.S. Co. Ltd.* v. *Ropner Shipping Co. Ltd.*[13] However, I understand that your Lordships are all satisfied, without further evidence, that carborundum is a "similar abrasive" to bonded emery. In these circumstances, there will be no remit, and I shall express my opinion briefly on the other issues arising in the case, on the assumption that carborundum is a similar abrasive to bonded emery.

I turn first to Mr. Shearer's second ground for submitting that regulation 1 does not apply to this case. I have already stated this ground, which was rejected by the First Division (affirming Lord Wheatley) in the case of *Wardlaw* v. *Bonnington Castings Ltd.*,[14] to which I have already referred. In my opinion, it was rightly rejected. I agree with the reasoning of the First Division and the Lord Ordinary in *Bonnington's* case,[14] and I see no reason why a particular operation should not be both "grinding" and "cleaning of castings" within the respective definitions. If so, the persons carrying out that operation must comply both with the requirements of the regulations in regard to grinding and with the requirements in regard to cleaning of castings.

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[13] 1924 S.C.(H.L.) 31; 17 Ll.L.R. 189.

[14] 1955 S.C. 320.

My Lords, I now come to the last of the three questions arising for decision. If regulation 1 applies in the present case, it is clear that the respondents did not comply with its terms, since they supplied no appliances at all for the interception of the dust from the plough buffs during the years 1942 to 1951. Thus there arises the question, has the appellant proved that this breach of the regulation has materially contributed to his incapacity?

In approaching this question I accept the Lord Ordinary's description of the results, as regards dust, of the operation carried out by the appellant at the plough buffs.

It is to be observed that regulation 1 begins with an absolute prohibition, but the latter part of it, though it is framed in negative terms, does, I think, import a positive provision that appliances which " substantially intercept the dust thrown off " are to be deemed adequate. Thus the question for decision may be stated as follows:—Has the appellant proved, on a balance of probabilities, that the dust which would have been intercepted if the respondents had supplied such appliances " materially " contributed to the disease "? I quote these words from the opinion of Lord Reid in *Bonnington's* case.[15]

My Lords, I would answer this question in the affirmative. The words " the dust thrown off " surely mean the whole of the inhalable dust thrown off, whether it be dangerous or harmless, and, to my mind, the words " substantially to intercept " mean that this dust must be intercepted, not wholly but in substance, that is, disregarding any non-substantial quantity of dust which the " hood or other appliance " may fail to intercept. If this had been done, I cannot doubt that it would have had a most significant effect upon the amount of harmful dust inhaled by the appellant.

It may well be that the appliances known during the period 1942 to February, 1951, were not such as " substantially to " intercept the dust thrown off," but this cannot affect the duty to intercept the dust, which is thrown upon the respondents by regulation 1. If they could not carry out that duty, they were in breach of regulation 1 in continuing to grind in the manner therein described.

For these reasons I would decide the question of causation in favour of the appellant, and but for the difficulty which I feel in deciding, on the evidence before this House, that carborundum is a " similar abrasive " to bonded emery, I should have been in favour of allowing the appeal.

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[15] [1956] A.C. 613, 621.

LORD COHEN. My Lords, I agree with the speech of my noble and learned friend on the Woolsack.

LORD KEITH OF AVONHOLM. My Lords, on the common law aspect of this case reliance was placed by counsel for the pursuer on the second limb of Lord Dunedin's dictum in *Morton* v. *William Dixon Ltd.*[16] But the whole tenor of the evidence is opposed to the idea that it was folly not to introduce a dust extractor in the operation of metal grinding in an iron foundry, or to provide respirators for the workers. There was no general appreciation among iron founders, as distinguished from steel founders, of any danger to workmen of pneumoconiosis from the grinding of iron castings during the period of the pursuer's employment, 1942 to 1951.

I would refer in this matter to two short passages in the evidence. The first is in the evidence of Dr. Baxter, a witness for the pursuer: " Q. Are you aware of the state of informed " knowledge in relation to the danger of disease in these two " types of foundry over the past years? A. Yes. Q. Is it not " correct to say that it is only comparatively recently that the " dangers of siliceous dust in iron foundries were fully understood " or known? A. Yes, that is quite correct; fully known. Q. I " think I am right in saying it was recognized for some considerable time back that there was danger of this nature present in " steel foundries. A. Yes. Q. Is not that correct? A. Yes." And in the evidence of Mr. Whiteside, a retired factory inspector, and a witness for the defenders, there appears this passage: " In " the year 1950, I would expect a steel founder employer to be " well informed of the potential danger of the siliceous particles " in his dressing shop. In 1950, I would not expect a good iron " founder employer to be aware of the risks of silica to anything " like the same extent as the steel founder." In the face of this and other evidence to which it is unnecessary to refer it is impossible to invoke *Morton* v. *William Dixon Ltd.*[16] This is sufficient, in my opinion, to dispose of the pursuer's case at common law.

Turning to the case on the statutory regulations, I would deal at the outset with the point taken by the defenders for the first

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[16] 1909 S.C. 807, 809.

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time in the Inner House and considered by the judges of the First Division, though not made a ground of their judgment, namely, that a carborundum wheel is not shown to be an abrasive wheel within the meaning of the regulations. No indication of this point is taken by the defenders in their pleadings, though the fact that a carborundum wheel was in use was disclosed by the pursuer in his condescendence. I do not propose, however, to enlarge upon a matter of pleading beyond saying that, if necessary, I should have been prepared to allow the pursuer to lead additional evidence without any conditions, to establish the nature of the carborundum wheel with which the plough buffs were fitted, with a view to showing, among other things, what carborundum is, its history, and its similarity to, or dissimilarity from, an emery wheel in its nature and functions.

I find myself able, however, to deal with the matter without further evidence, on a consideration of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925 (S.R. & O., 1925, No. 904). " Grinding," and so " dry grinding," is related to the definition of " grindstone " and " abrasive wheel." We are not concerned here with a " grindstone " in the sense of the regulations, though in the evidence the appliance in question was referred to by both sides as a " grindstone " as a matter of ordinary parlance. We are concerned with an " abrasive wheel," which is defined as " a wheel manufactured of bonded emery or " similar abrasive."

" Similar abrasive " is a somewhat ambiguous term. There is no catalogue of abrasives from which any genus can be inferred. The question turns solely on the effect of the word " similar." Is the similarity to be found in the chemical composition of the other abrasive or in its functional efficiency? Is it enough to have a substitute for " bonded emery " to perform the same kind of work in the same kind of way as bonded emery is intended to do? The type of evidence that would be required to establish similarity must depend upon what meaning is to be given to the term " similar abrasive." The most natural meaning, in my opinion, is something which abrades metal in the same way as emery, because the regulations are dealing, inter alia, with the grinding of metals. There is nothing to indicate that in dry grinding the regulation is concerned with the chemical composition of the grinding material. If it were, little content could be given to the word " abrasive." It was suggested that the similarity is in respect of the dangers emanating from the material of which the wheel is composed. But that is difficult to reconcile with the fact that the definition has remained unchanged for over 30 years, and for a large part of that period it was recognized, at least in the steel industry, that the main danger was from silica burnt into the steel castings in the processes before grinding. When I consider also some other paragraphs of the regulations, I think they support the view that it is the function and not the composition of the wheel that should be looked to with reference to the words " similar " abrasive."

" Glazing " is defined as " the abrading, polishing or " finishing, by the aid of mechanical power, of metal, article of " metal, or part of any article of metal by means of any wheel, " buff, mop, bob, dolly, or band to which any abrading or polishing substance is attached or applied," with a certain exception which it is not material to notice. Here there clearly is no limit to the type of " any abrading or polishing substance," and it is difficult to understand why, in the case of an abrasive wheel, the abrasive should be confined to some material of the same chemical family as emery.

" Sand blasting " is defined as " the cleaning or smoothing " of castings by a jet of sand, metal shot or grit or other abrasive, " propelled by a blast of compressed air or steam." Under the ejusdem generis rule it would not seem possible to limit the abrasive except to exclude an abrasive which was not a solid. Sand and metal shot do not come within the same genus of substances chemically and any solid material which could function equally well as an abrasive would seem to fit the definition.

Regulation 3 provides that " Not more than one person shall " at any time be allowed to perform the actual process of grinding " or glazing upon any grindstone, abrasive wheel, or glazing " appliance "; and regulation 9 (*a*) prescribes that: " In every " room in which grinding is carried on there shall be kept permanently affixed a notice specifying the safe working peripheral " speed of every class of grindstone and abrasive wheel in use in " such room." It is difficult to understand why these regulations should not apply just as much to an abrasive wheel of carborundum as to an abrasive wheel of bonded emery.

Lastly, amending regulations were made in 1950 (The Grinding of Metals (Miscellaneous Industries) (Amendment) Special Regulations, 1950 (S.I. 1950, No. 688)). By this date the dangers from the grinding of castings impregnated with sand were fully realized, yet no change was made in the definition of " abrasive wheel."

On all these considerations, accordingly, I have come to the opinion that "similar abrasive" in the definition of "abrasive "wheel" refers to the function performed by the abrasive and not to the chemical family to which the abrasive belongs.

On the footing that the pursuer was engaged in dry grinding within the meaning of the regulation, there clearly was a breach of the regulation in failing to provide a dust interceptor or in continuing to employ workmen at the plough buffs without one.

The judges of the First Division have, however, found that the pursuer has failed to prove that his illness was due to breach of the regulation. In my opinion, they have erred in two respects. They regard the regulation, as the Lord President put it,[17] as "dealing with dust in general and not the dangerous particles "in particular." He includes among the dust particles of metal thrown off from the castings and carborundum from the wheel. On the assumption that these are "dust" the evidence is that they are thrown away from the operator of the wheel against a steel plate at the back of the machine and fall to the floor, where they cake into a hard mass. The particles of metal, at least, could hardly float in the air, and what the regulation is dealing with is inhalable dust. It is, therefore, no answer to say that if an exhaust apparatus had been provided which carried away these particles of metal and carborundum, there would have been substantial compliance with the regulation, which, to quote the Lord President,[17] "would leave unaffected practically all the "dangerous dust." This was one ground on which the Lord President proceeded, and Lord Russell followed a similar line of reasoning. The other ground was that, on the evidence, there was very little sand in the castings when they came to the plough buffs and that no attempt was made in the pursuer's evidence to quantify the amount of dangerous dust. There might be some force in this point if the other ground was a valid one. The invisible particles of silica thrown off from the sand might possibly be held to be a negligible proportion of the total quantity of the material thrown off in the grinding, though in themselves they might not be so negligible that they could not be a contributory cause of the pursuer's illness. But it is the inhalable dust with which we are concerned, and it cannot, I think, be held on the evidence that the invisible particles were a negligible or unsubstantial part of the total inhalable dust.

There is evidence from workmen of sand adhering to the castings and of fine dust being thrown off in the process of

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[17] 1956 S.C. 224, 235.

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grinding. The witness Stabler says: "I have had a good deal of "experience in measuring dust clouds by instruments, and I "have never come across a case of a visible cloud of dust which "didn't include a heavy concentration of the finer particles "which do attack, and I have come to the conclusion if ever in "visiting foundries I see a cloud of dust I know that the finer "particles are there. That is as a result of my experience in "measuring such clouds." There was enough of the dangerous dust to incapacitate the pursuer, as the Lord Ordinary has held, and this I apprehend was not disputed by the defenders. If an adequate appliance had been fitted as near as possible to the point of origin of the inhalable dust, I think it is a reasonable inference that the dangerous particles would have been removed to as great an extent as the inhalable visible particles, if not to a greater extent, and if the appliance was inadequate to intercept or at least substantially to intercept, the visible inhalable particles, and ex hypothesi the invisible inhalable particles, it would not comply with the regulation.

I refer again to the witness Stabler, who says it was quite practicable to fit an appliance for the interception of dust to the plough grinders. His evidence proceeds: "It is quite practicable, in my experience, to fit such grinders with ducts and "fans, for instance. Q. And if such an appliance is fitted, what "is the effect as regards the dispersal of such particles into the "atmosphere of the factory? A. It would have a similar effect as "on the other grinders in this shop, to which it was applied. "It wouldn't entirely do away with the dust, but it would take "away the major portion of it. It would prevent, quite "definitely, the visible cloud that I saw. Q. As regards the "smaller invisible particles, would they be affected by that also? "A. Yes, that is the main object of getting a draught sufficient "at the grinding wheel or buff, and in a way so as to take it "away from the operator, and greatly reducing, at all events, the "concentration of the particles."

Whiteside, a witness for the defenders, asked about an exhaust appliance in the shape of a flexible pipe which he had seen for many years attached to swing grinders in similar factories, said, in cross-examination, that it was reasonably efficient but did not collect all the airborne dust. His evidence then continues: "Q. Where exhaust appliances are used on "swing frame grinders, the silica particles will be likeliest to be "drawn into the suction system? A. Yes, it probably will be. "It is very, very light and being deflected from the draught is "the most likely to be drawn into the suction. Q. So that if "exhaust appliances were fitted, it is the silica part which is "likeliest to be removed? A. Yes."

The witness Arnott, another witness for the defenders, gives such an appliance a 30 per cent. efficiency.

Lord Russell seems to have gone further than the Lord President in this matter. On the weight of the relevant evidence he says[18]: "I am accordingly satisfied that no substantial "quantity of dangerous sand is proved to have been emitted into "the air of the dressing shop from the plough buffs; and that any "such dust as was incidentally emitted neither caused nor contributed to the aggravation of the pneumoconiosis by which the "pursuer became incapacitated." This does not seem entirely consistent with a previous passage in his opinion, where he says[19]: "The Lord Ordinary has found . . . that during his time in the "defenders' service the progress of the disease had been aggravated to the point of incapacitating him. I am satisfied that "the weight of the relevant evidence reasonably supports that "conclusion." But for the reasons I have already stated I think Lord Russell in the later passage of his opinion reached a wrong conclusion.

On the further point taken by the defenders that the pursuer was engaged not in "dry grinding" but in the "cleaning of "castings" within the meaning of the regulations I have nothing to add to what has been said. In my opinion the court below reached a correct conclusion in holding that the two processes are not mutually exclusive under the regulations. I would accordingly allow the appeal and remit to the Court of Session to give decree for £4,000 damages.

Appeal allowed.

Solicitors: *W. H. Thompson for Donald Shaw & Co., S.S.C., Edinburgh; Beveridge & Co. for Campbell, Smith, Mathison & Oliphant, W.S., Edinburgh, and Briggart, Lumsden & Co., Glasgow.*

F. C.

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[18] 1956 S.C. 224, 240–241.

[19] Ibid. 237.

COMMISSIONER OF INCOME TAX . . . APPELLANT;

AND

WILLIAMSON DIAMONDS LTD. . . . RESPONDENT.

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ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Eastern Africa—Tanganyika—Revenue—Income tax—Company—Statutory power of revenue authority to order distribution of dividend—Unless satisfied that losses incurred render distribution unreasonable—"Losses" not to include capital losses—All matters relevant to unreasonableness, including capital losses, to be considered—Tanganyika Income Tax (Consolidation) Ordinance, No. 27 of 1950, *s.* 21.

Revenue—Income tax—"Losses"—Meaning—Tanganyika.

By section 21 (1) of the Income Tax (Consolidation) Ordinance, 1950, of Tanganyika: "Where the commissioner is satisfied that "... the profits distributed as dividends . . . are less than 60 per "cent. of the total income of the company" for the specified period "he may, unless he is satisfied that having regard to losses "previously incurred by the company or to the smallness of the "profits made, the payment of a dividend or a larger dividend "than that declared would be unreasonable, . . . order that the "undistributed portion of 60 per cent. of such total income of "the company for that period shall be deemed to have been distributed as dividends amongst the shareholders . . . and thereupon "the proportionate share thereof of each shareholder shall be "included in the total income of such shareholder. . . ."

A company, of which the respondent assessee was a large shareholder, out of its total income for tax purposes for the year ended December 31, 1950, declared no dividends, and the appellant, the Commissioner of Income Tax, made an order that 60 per cent. of the company's total income should be regarded for tax purposes as having been distributed to the respondent and other shareholders. The respondent claimed that the commissioner in making his order under section 21 of the Ordinance of 1950 had failed to take into account capital losses which, it was alleged, the company had sustained:—

Held, first, that on the facts the respondent had failed to establish that the company had sustained a loss of any kind (no question of "smallness of profits" arose), and accordingly the respondent's case failed.

Per curiam, obiter: In light of the definition in section 2 of the Ordinance that "'loss' . . . means loss computed in like "manner as profits," the word "losses" in section 21 of the Ordinance does not include capital losses.

Held, further, that it was impossible for the commissioner to arrive at a conclusion as to reasonableness by considering the two

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* *Present*: LORD TUCKER, LORD DENNING and the RT. HON. L. M. D. DE SILVA.

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matters mentioned in section 21—" losses previously incurred " and "smallness of the profits"—isolated from other relevant factors; the Ordinance did not say " having regard only " to those matters. The Ordinance required all matters relevant to the question of unreasonableness to be considered, and capital losses, if established, would be one of them.

Judgment of the Court of Appeal for Eastern Africa reversed.

APPEAL (No. 3 of 1956) from a judgment and order of the Court of Appeal for Eastern Africa (April 7, 1955) allowing the present respondent's appeal against a judgment of the High Court of Tanganyika (May 11, 1954) which had dismissed the respondent's appeal from a decision of the Local Committee confirming an assessment to income tax made by the present appellant on the respondent.

The following facts are taken from the judgment of the Judicial Committee: This appeal was concerned with the interpretation of section 21 of the Tanganyika Income Tax (Consolidation) Ordinance, 1950, which provided that under certain conditions the Commissioner of Income Tax might, for the purpose of assessing the income of the shareholders of a company, make order that, within prescribed limits, the undistributed profits of a company were regarded as having been distributed dividends.

The section read:—" 21.—(1) Where the commissioner is " satisfied that in respect of any period for which the accounts of " a company resident in the Territory have been made up, the " profits distributed as dividends by that company up to the end " of the sixth month after the last date upon which its accounts " for that period are required by virtue of the provisions of the " Companies Ordinance to be laid before the company in general " meeting, increased by any tax payable thereon are less than " sixty per cent. of the total income of the company ascertained " in accordance with the provisions of this Ordinance for that " period, he may, unless he is satisfied that having regard to " losses previously incurred by the company or to the smallness " of the profits made, the payment of a dividend or a larger " dividend than that declared would be unreasonable, by notice " in writing order that the undistributed portion of sixty per cent. " of such total income of the company for that period shall be " deemed to have been distributed as dividends amongst the " shareholders as at the said last date and thereupon the proportionate share thereof of each shareholder shall be included in " the total income of such shareholder for the purposes of this " Ordinance."

The respondent had a large holding in the shares of the Buhemba Mines Limited (hereafter referred to as the company). In respect of the year ending December 31, 1950, no dividends were declared by the company. The total income for income tax purposes was £38,160 and the commissioner made order that 60 per cent. of that sum, namely, £22,896, should be regarded for tax purposes as having been distributed to the respondent and other shareholders.

From the decision and order of the commissioner the respondent appealed to an appellate tribunal known as the Local Committee, which affirmed the decision of the commissioner. From the decision of the Local Committee the respondent appealed to the High Court of Tanganyika (Mahon J.), which affirmed the decision of the Local Committee. On appeal to the Court of Appeal for Eastern Africa (Nihill P., Worley V.-P. and Briggs J.A.) the case was remitted to the commissioner for a second decision by him on the basis of an interpretation which the Court of Appeal placed upon section 21 different from the interpretation placed upon it by the commissioner and on the previous appeals. This was an appeal by the commissioner from the decision of the Court of Appeal. No question had been raised by the parties as to the right to appeal of the appellant in the appeals mentioned.

Under the procedure obtaining in Tanganyika the proceedings before the commissioner and before the Local Committee were not placed before the courts but under the relevant law a statement of facts was attached to the " memorandum " of appeal to the High Court.

1957. June 24, 25. *Heyworth Talbot Q.C.* and *Roderick Watson* for the appellant. Although the assessment here challenged is made under the East African Income Tax (Management) Act, 1952, which repealed and replaced section 21 of the Tanganyika Income Tax (Consolidation) Ordinance, 1950, it is not disputed that the point at issue is one which arises on the construction of section 21 of the Ordinance of 1950. That Ordinance bears certain marks of affinity with the Finance Act, 1922, of the United Kingdom and also has certain points of difference. [Section 21 of the United Kingdom Act of 1922 and section 21 of the Tanganyika Ordinance were referred to.] Under the United Kingdom system there is a right of appeal against the making of the direction; and the consequential assessment can be challenged. Before the commissioner can exercise his discretion under the

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Ordinance he has first to determine whether he is satisfied on the specified points. If he is so satisfied, then he may make an order under the section: the critical words are those in parenthesis —he may make an order " unless he is satisfied that having " regard to losses previously incurred by the company . . ." the payment of a dividend would be unreasonable. The question to which the mind of the commissioner was required by section 21 to be addressed was not whether there were available profits out of which a dividend ought to have been declared by Buhemba Mines Ltd., but whether, having regard to losses previously incurred by that company, the payment of a dividend out of its profits for the year 1950 would have been unreasonable. There was no material in this case, notwithstanding the losses previously sustained by the company on capital account, which could have justified the commissioner in the conclusion that it would have been unreasonable to have paid a dividend out of the profits for the year 1950.

Further, the word " losses " in section 21 connotes a loss within the definition in section 2 of the Ordinance of 1950; it is a trading loss and not a loss in respect of a capital asset that has to be taken into account, and on this footing no losses had been previously incurred by the company. In any case, the expression " losses previously incurred," whether it denotes losses on revenue account purely or embraces capital losses, must surely mean losses shown by an over-all examination of the position. If that is so, that may be the explanation of what Mahon J. said in his judgment in the High Court: " I can find no ground for " holding that the balance sheet of the company for 1950 shows " an over-all deficiency of capital. That being so, it becomes " unnecessary for the purpose of deciding this appeal to construe " the meaning of 'losses' in section 21."

Section 21 corresponds very closely in its form with section 23A of the Indian Income Tax Act, 1922, directed to the same object. The word in the Indian Act is " shall " unless he is satisfied, etc. —the parenthesis is the same. The onus is on the respondent to satisfy the commissioner that it is unreasonable to declare a dividend. Reliance is not placed on the Indian case of *Sir Kasturchand Ltd.* v. *Income Tax Commissioner, Bombay.*[1] The onus of satisfying the commissioner was and remained on the respondent, and on the facts proved no one could say that any losses had been incurred. The case should not have been remitted, and to that extent the decision of the Court of Appeal below was wrong. If there is any question of remission to anybody, it should be to the judge. It is a little strange that the East African legislature has not followed the example of the United Kingdom in giving a right of appeal against an order of the commissioner. The court below was right in so far as it held that there was no evidence that the company had sustained an over-all capital loss, but wrong in so far as it held that the discretion vested in the commissioner by section 21 had been exercised on wrong principles.

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[1] A.I.R. (1950) Bom. 1.

Roy Borneman Q.C. and *S. L. Newcombe* for the respondent. The commissioner is seeking the Board's guidance on a question of principle and has agreed to pay the costs of this appeal in any event. There are two submissions: (1) The Court of Appeal was right to remit this case to the commissioner for him to reconsider it by applying the proper principles of law; but quite clearly it would be in everybody's interest that it should go back to the judge. (2) In the circumstances of this case the commissioner's powers had never been exhausted, and he having proceeded on a wrong basis, the order made cannot in any event stand. The first submission is the one of substance, and is that the commissioner proceeded on the wrong basis in taking the view that he was not bound to take into account any capital losses. He took up the position that he was not entitled to, and would not, look at any losses which were not losses of income. That is quite wrong; capital losses must clearly be included. Section 21 in the last resort really involves a business man's approach and not that of a lawyer. "Profits" in that section are only commercial profits—the section is not tied to income tax terminology. The general approach to this and all sections in such words as "having "regard to losses previously incurred" must be regarded in view of the whole of the financial position, including capital losses. In the context of this section it is clear that losses incurred by the company should incorporate all types of losses in the commercial sense. To shut out all but income losses results in an unrealistic view of the company's position. [Reference was made to *Inland Revenue Commissioners* v. *Universal Grinding Wheel Co. Ltd.*[2]] In not entertaining capital losses the commissioner was obviously proceeding on a wrong basis and has clearly exercised his discretion on a wrong ground. He cannot escape his duties and responsibilities in this regard merely by saying that the onus is on the taxpayer to prove that an assessment is excessive.

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[2] [1955] A.C. 807; [1955] 2 All E.R. 29; 35 T.C. 551.

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The Ordinance (section 60) gives the commissioner power to get all the facts he needs on which to exercise his discretion. It is much wider than the English Act. He here has not done otherwise than decline to put himself in a position to know the relevant facts. That is what the Court of Appeal has said, and they remitted it to him to consider on the proper principles. Material was put before him which showed clearly that there had been a capital loss, and the financial position of the company was such that a dividend could not properly and reasonably be distributed. The commissioner failed to discharge the onus which was upon him to show that the company had acted unreasonably in not declaring a dividend. If the commissioner had taken into account the proper matters, then his decision on questions of fact would be unassailable. But that cannot cover the case where he has declined to take into account the relevant matters. A purported exercise of discretion on a wrong principle is no exercise at all. This is a penal section, and the Court of Appeal rightly sent it back for the discretion to be operated properly.

Heyworth Talbot Q.C. in reply. In section 21 " loss " means none other than a revenue loss unless the context otherwise requires—and it is the context of the legislation itself. The context does not otherwise require unless it can be shown that nonsense is made of the section if the statutory definition is adopted. The view of the commissioner was right—that loss meant loss as here defined.

Oct. 2. The judgment of their Lordships was delivered by the RT. HON. L. M. D. DE SILVA, who stated the facts set out above and continued: It will be seen from section 21 that the commissioner had, before making an order under it, to decide whether or not " he is satisfied that having regard to losses " previously incurred by the company or to the smallness of " the profits made, the payment of a dividend . . . would be " unreasonable."

The question which had to be decided was whether the commissioner had properly interpreted and properly applied these words to the facts of this case. The commissioner took the view that there was no direction in these words to take capital losses into account. The Court of Appeal thought that there was. It will be seen from what follows in this judgment that a decision upon this point was not necessary to the decision of this case.

It appears from the statement filed with the memorandum of appeal and from the judgments in the courts below that before

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the High Court (and presumably before the commissioner and the Local Committee) the respondent relied upon a balance sheet and a profit and loss account for the year ending December 31, 1950, to establish that the company had suffered loss and that therefore it was unreasonable to pay a dividend. No oral evidence was led. The documents showed a net profit of 1,081,630 shillings (the items are shown in shillings) for the year. In the balance sheet under the heading "Assets and Losses" appear the following entries:—

ASSETS AND LOSSES

Fixed Assets at Cost *less* Depreciation:
(Except where otherwise stated)

DEVELOPMENT:			
No. 1 Account			
As per last Balance Sheet		1,762,402·95	
Less: Amount w/off 20 per cent. approx.		587,469·65	
Representing old Development to be written off			1,174,935·30
No. 2 Account			
As per last Balance Sheet		393,401·67	
Additions during year		368,485·24	
		761,886·91	
Less: Redemption—33,052 tons at Sh. 7/26		239,957·52	
Representing Current Development			521,929·39
Nigtoi Claims			
As per last Balance Sheet		20,318·61	
Additions during year		451·05	
		20,769·66	
Less: Loss Claims Nos. 7588/89, 7592 and 7594 abandoned	4,000·00		
Amount w/off ...	11,769·66		
		15,769·66	
			5,000·00

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It was agreed in the courts below that the sum of 1,174,935 shillings shown in " Development No. 1. Account " had to be written off completely as the mine to which it related was a failure. This was the only material relied on by the respondent to establish his case in the courts below. Accepting his statement that there had been a loss on the first item, the balance sheet does not reveal the value of the assets of the company. The figures set against the items of assets are their " cost less depreciation " and not market value. With regard to the item " No. 2 Account " in the balance sheet the Court of Appeal said:—" The company has two mines of which one is worthless. " A large sum spent on that worthless mine has been lost and is " being written off. The other mine is working and producing " profits. A large sum spent on developing it is rightly regarded " as an asset; but no attempt has been made to show in the " balance sheet or otherwise the value of the mine itself," and it went on to hold " the balance sheet is valueless for the purpose " of estimating the company's true capital position." There can be no doubt that these views are correct. Both the courts in Africa have held, and it is clear to their Lordships, that the respondent has failed to establish that the company sustained a loss of capital and, as this is the only loss the respondent sought to establish, it has not established a loss of any kind whatsoever. The case for the respondent was that the company had suffered considerable losses in previous years. There was no assertion of " smallness of profits," the alternative ground appearing in section 21. As the respondent failed to establish losses of any kind its case fails and must inevitably fail before the commissioner on the material it chose to rely upon, if, as ordered by the Court of Appeal, it is sent back for a second decision by the commissioner.

It was argued that some losses were established and that therefore it was for the commissioner to find out for himself whether there had been compensating gains. Their Lordships do not think that there is anything in the language of the Ordinance which casts any such duty upon the commissioner. It would, moreover, be in the generality of cases, a task, which a person with the limited knowledge of the affairs of a company which can be imputed to the commissioner, could not efficiently perform.

It is, for the reasons already given, unnecessary for their Lordships to decide whether the commissioner should under section 21 take capital losses into account. But their Lordships will consider it as it has been fully argued and a decision upon it would be helpful in the future application of the section.

The word "loss" is defined in the Ordinance thus in section 2:—"2. In this Ordinance, unless the context otherwise "requires . . . 'loss' in relation to a trade, business, profession "or vocation means loss computed in like manner as profits." It is common ground that if this meaning is given to the word "loss" it would bear the meaning it does in every other part of the Ordinance and would not include a loss of capital.

It is not possible in law to give to the word "losses" any meaning other than the meaning given to it in the defining section of the statute unless, as stated by the statute itself, the "context "otherwise requires." To do so would be to disregard and disobey the terms of the statute. Their Lordships are of the view that the context does not "require" any departure from the meaning already set out. They are therefore of the opinion that the word "losses" does not include capital losses.

It was said in the course of the argument that on the ground of fairness the word "losses" should be interpreted to include capital losses. It will be seen from what follows that the interpretation already given does not lead to unfairness but, even if it did, it would not be possible to alter the interpretation plainly laid down by the statute on the ground of fairness.

It does not follow from what has been said that capital losses should not be taken into account by the commissioner. Two matters are mentioned specifically in the words which give him a direction, the first is "losses" (as interpreted above) and the second is "smallness of profits." The commissioner is directed to come to a decision upon the question whether "the payment "of a dividend or a larger dividend than that declared" is unreasonable.

The form of words used no doubt lends itself to the suggestion that regard should be paid only to the two matters mentioned, but it appears to their Lordships that it is impossible to arrive at a conclusion as to reasonableness by considering the two matters mentioned isolated from other relevant factors. Moreover, the statute does not say "having regard only" to losses previously incurred by the company and to the smallness of the profits made. No answer, which can be said to be in any measure adequate, can be given to the question of "unreasonableness" by considering these two matters alone. Their Lordships are of the opinion that the statute by the words used, while making sure that "losses and smallness of profit" are never lost sight of,

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requires all matters relevant to the question of unreasonableness to be considered. Capital losses, if established, would be one of them.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal be allowed and the decision of the High Court restored. It was agreed between the parties that the appellant should pay the costs of this appeal. The respondent must pay the costs in the High Court and in the Court of Appeal.

Solicitors: *Charles Russell & Co.; T. L. Wilson & Co.*

C. C.

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July 2.

TETZNER . . . . APPELLANT;

AND

COLONIAL SUGAR REFINING CO. LTD. . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF FIJI.

Fiji—Rating—Valuation of land—"Unimproved value"—Method of assessment—Local Government (Towns) Ordinance of Fiji, 1947 (*No.* 26 *of* 1947), *as amended by the Local Government* (*Towns*) (*Amendment*) (*No.* 2) *Ordinance* (*No.* 7 *of* 1948).
Rates and Rating—"Unimproved value."

The respondent company was the owner of a large sugar mill in Lautoka, Fiji, occupying some 650 acres, which was assessed by the appellant, who was the official valuer in the colony, for rating purposes at £161,297. The respondent alleged that the appellant had failed to assess the unimproved value of the land under the Local Government (Towns) Ordinance, 1947, in accordance with correct legal principles in that he had made a valuation on a comparison with the values of surrounding land:—

Held, that the correct method of valuation was that physical improvements, with any value which they attached to the land on which they were situated, should be excluded from the valuer's computation, and the land should then be valued as land void of buildings but situate in the town, together with the amenities and facilities which surrounded it.

Toohey's Ltd. v. *Valuer-General* [1925] A.C. 439 considered.

Judgment of the Supreme Court of Fiji reversed.

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* *Present*: LORD TUCKER, LORD KEITH OF AVONHOLM and LORD DENNING.

[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

Appeal (No. 6 of 1956) by special leave from a judgment of the Supreme Court of Fiji (May 27, 1954) reversing a decision of the First Class Magistrate's Court at Lautoka (October 10, 1953).

The following statement of facts is taken from the judgment of the Judicial Committee: the appeal arose out of a valuation for rating purposes of certain land belonging to the respondent company within the town of Lautoka, in the Colony of Fiji. The valuation made by the appellant, Sergius Alexander Tetzner, the official valuer in the Colony, was £161,297. The company appealed against this valuation to the magistrate's court, Lautoka. The appeal, which was originally confined to mere matters of area and quantum of valuation, was amended to include what was the substantial question in the present appeal, whether the appellant had failed to assess the unimproved value of the land in accordance with correct legal principles inasmuch as he had, it was said, wrongly taken into account factors which should in law be disregarded in assessing such unimproved value. The company claimed that on a correct application of these principles the unimproved value of the lands did not exceed £13,000. The magistrate reduced the valuation to £110,493. The company appealed against this decision to the Supreme Court of Fiji (Carew J.), which set aside the valuation of the magistrate and remitted the proceedings to the magistrate's court.

The company came to Lautoka in 1903 and set up a sugar cane crushing mill. The total area of the company's estate amounted to some 2,200 acres, but until 1952 none of that estate was within the town of Lautoka. In that year the boundaries of the town were extended to take in, inter alia, 650 acres of the company's land. The other material facts are as follows:—(A) The respondent's land comprised some 650 acres in the town of Lautoka. (B) The respondent had erected on this land a large sugar mill with its subsidiary installations. It had made roads on the land. It had constructed a wharf adjoining its land. (C) Lautoka was a prosperous sugar town where land values were high. (D) Lautoka had only one sugar mill which was that erected on the respondent's land. (E) Lautoka's prosperity depended to a large degree on the existence of this sugar mill. (F) The sugar mill had been a major factor in creating, and was a major factor in maintaining, the values of land in Lautoka. (G) If the sugar mill were closed down the present market values of land in Lautoka would drop very considerably.

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The valuation code was contained in the Local Government (Towns) Ordinance, 1947 (No. 26 of 1947), as amended by the Local Government (Towns) (Amendment) (No. 2) Ordinance (No. 7 of 1948). Sections 99 and 100 of the Ordinance of 1947, on which the question in the appeal turned, provided: " 99. Subject " to the provisions of section 98 every rate made and levied by " a town council under the provisions of this Ordinance shall " be assessed at a uniform amount per centum on the unimproved " value of all rateable land within the town, or within that area " of the town to which the rate applies. 100. The unimproved " value of land shall be the capital sum which the fee simple of " the land might be expected to realize if offered for sale on " such reasonable terms and conditions as a bona fide seller would " require assuming that the improvements, if any, thereon or " appertaining thereto and made or acquired by the owner or " his predecessors in title had not been made."

1957. May 27, 28, 29, 30. *E. I. Goulding* and *V. G. H. Hallett* for the appellant. It is common ground that in this type of case the valuer must conceive the subject land to be bare of improvements, and that his task does not require him to discover the nature of the subject land before it was improved. The valuer's task is to value the bare plot of land as it stands today, and to do this he must view the surrounding land and its physical condition as at the date of valuation. It is pertinent to consider whether economic conditions, and in particular the land values of the district as existing at the date of valuation, should be borne in mind, or whether the valuer must guess what those conditions would have been if the subject land had not been improved. It is submitted that the only practical way of making a valuation is to value the land by the standard of actual land values prevailing in the neighbourhood without any other hypothesis.

Should the Board allow this appeal, the appellant seeks an order either (i) that the valuer's valuation was essentially correct in principle, or (ii) that the proceedings be remitted directing the appellant to make a valuation of the respondent's land as it at present stands, with such advantages as it now possesses, and viewed as bare land without any buildings upon it, but surrounded by adjoining and neighbouring lands in their actual condition and with their present value, regardless of the causes of that condition and value. The guidance given by Lord Dunedin in *Toohey's Ltd.* v. *Valuer-General* [1] in equating valuation to compulsory

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[1] [1925] A.C. 439, 443.

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acquisition does not afford any solution to the problem in this case, when combined with other authorities on compulsory acquisition. In *Cedar Rapids Co.* v. *Lacoste* [2] the real question to be investigated was the suitability of the land for the purpose for which it was required. In *Fraser* v. *City of Fraserville* [3] it was laid down that the value to be ascertained was the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property was compulsorily acquired; it is submitted that in applying these to the unimproved capital value of the land under Fiji law it is necessary to read in the words " as bare land, " at the time of valuation." Although these principles are a correct guide as far as they go, they do not go far enough to cover the hypothetical state.

The judgment of the majority in *McGeoch* v. *Federal Commissioner of Land Tax* [4] does not, it is submitted, support the judgment given by the Supreme Court of Fiji in this case; the minority judgment, however, ought to be preferred. As to the majority judgment, the submission is that their Lordships there had not in mind at all the problems presented by the stimulus of improvements carried out on the subject land to operations on the surrounding land, and hence to the neighbourhood. As to the minority judgment, reliance is placed, first, on the statement of Isaacs J. that regard must be had to the practical nature of the valuer's task and to the object of the system of taxation, and, secondly, it is submitted that Isaacs J. was correct in thinking that *Toohey's* case [5] limits the valuer's task to disregarding improvements *on* the land as distinct from improvements *of* the land, and improvement of other land consequent on operations upon the subject land. [Reference was also made to *Commissioner of Land Tax* v. *Nathan.*[6]]

Sir Garfield Barwick Q.C., *B. J. M. Mackenna Q.C.* and *L. G. Scarman Q.C.* for the respondent. The idea behind this method of rating is to tax the unearned increment or unearned value due to the efforts of the community either collectively or individually. Another aspect is to ensure that the earned increment should not be taxed, with a view to encourage development and improvement of land. A construction of this Ordinance which taxes the earned increment is inconsistent with that policy.

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[2] [1914] A.C. 569; 30 T.L.R. 293.
[3] [1917] A.C. 187, 194.
[4] (1929) 43 C.L.R. 277.
[5] [1925] A.C. 439.
[6] (1913) 16 C.L.R. 654.

The value to be sought is the price which would be paid for the land at the relevant time with no improvements on it. Any increment of value to the land, which is due to circumstances extrinsic to the making of improvements thereon, must be included in the price, which is the value to be taxed. Any increment of value which is due to the making of improvements must be excluded. Under the Ordinance the valuer should, when making his valuation, (1) assume that the land is vacant; (2) assume that the neighbouring land is in its actual condition, whether improved or unimproved; (3) assume that there is no sugar mill at all in Lautoka; (4) disregard prices actually realized for other lands in the neighbourhood in so far as those prices were higher than they would have been if there had been no sugar mill on the subject land; (5) disregard prices realized on sales of land elsewhere than in Lautoka, if the actual circumstances of those sales differ in material respects from those which are required to be assumed for the hypothetical sale; (6) assume that the demand for land in Lautoka at the time of the hypothetical sale is such as it would be if there were no sugar mill in Lautoka; (7) assume a sale of the whole land in one parcel, but if, on the assumption that there is no mill, the land has a potentiality of disposal in sub-division, the valuer may reflect the value of that potentiality in the price of the whole sold in one parcel. The value of that potentiality will not be the sum of the prices which the sub-divided lots may be expected to fetch, but it will be some lesser sum after due allowance has been made for (i) costs of sub-dividing, (ii) expenses of sale and realization, (iii) expenses, interest and rates pending realization, (iv) the risk of inaccuracy in the estimated prices to be obtained for the sub-divided lots, (v) the risk of the venture and the profit of the sub-divider. [Reference was made to *Turner* v. *Minister of Public Instruction.*[7]] (8) If the valuer thought it reasonably probable that a buyer could be found who would purchase the land for a mill, the valuer may fix for the value the price which such a buyer would give.

As to the cases which have been cited, two views emerge regarding what is meant by "prairie value"; they are of no materiality here. In *McGeoch's* case[8] the court did not advert to this problem at all and no profit is to be found in supporting the majority judgment there. The compensation cases are only useful to emphasize that the potential of the land is to be taken into account. The appeal should be dismissed.

[7] Australian Law Journal, vol. 29, p. 579.

[8] 43 C.L.R. 277.

E. I. Goulding replied and, in addition to the authorities already cited, referred to *Cox* v. *Public Trustee*.[9]

July 2. The judgment of their Lordships was delivered by LORD KEITH OF AVONHOLM, who stated the facts set out above and continued: It is common ground that what has to be valued is the bare ground occupied by the company. It is also agreed that this land so far as contiguous should be assessed as a single unit, though for purposes of valuation the valuer has applied different figures of value for separate lots within the whole. The main issue between the parties is on the principles of valuation to be applied. The land, stripped of its buildings and other physical improvements, may be regarded as being in its original condition so that no question arises here, as has arisen in some cases, of land which has been reclaimed or otherwise made suitable for development purposes. The valuer in evidence explained his method of valution as follows: " In my calculations " I had to assume no mill, but I took into consideration the " inherent qualities of the land, its features and its proximity to " what in fact does exist, viz., Lautoka and amenities, e.g., " Administrative centre, hospital, courthouse, which installations " are surrounded by appealed land. I took into account schools, " churches, playgrounds." In a later passage he said: " I " assumed Lautoka as it is today in assessing. I didn't assume " what Lautoka would be like without the mill."

The Supreme Court of Fiji (Carew J.) rejected this approach of the valuer. The learned judge relied on a passage in a judgment of this Board delivered by Lord Dunedin in *Toohey's Ltd.* v. *Valuer-General*[1] dealing with a similar statute in New South Wales, as follows: " Now, what he (the valuer) has to consider " is what the land would fetch as at the date of the valuation if " the improvements had not been made. Words could scarcely " be clearer to show that the improvements were to be left " entirely out of view. They are to be taken, not only as non- " existent, but as if they never had existed." Their Lordships will refer later to *Toohey's* case.[1] The learned judge in the present case, in applying the passage quoted, said: " In the first " place, if the mill must be regarded as never having existed, how " can influence flow from it? A thing which never existed can " hardly exert any influence. Secondly, his method of approach " would seem to offend against that principle of rating taxation " which requires the exclusion of improvements made at the

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[9] [1918] N.Z.L.R. 95.

[1] [1925] A.C. 439, 443.

"owner's expense. Counsel would have the appellant company "[i.e., the present respondent] taxed on an influence which it "had built up at great expense by the erection on the subject "land of a sugar mill." This line of reasoning was developed by Sir Garfield Barwick, for the company, before their Lordships' Board. The policy of the Ordinance, he said, was to encourage development in a largely undeveloped country by freeing earned increment from taxation and taxing only unearned increment due to the efforts of the community collectively or individually. To make a valuation upon a comparison with the values of surrounding land which were due largely to the fact that a mill had been built and other improvements made on the company's land was to make an untrue comparison and to tax the company on such a valuation was to tax it upon values created by the company itself.

In their Lordships' view this argument places upon section 100 of the Ordinance a meaning which it cannot, on a reasonable construction, be taken to bear. The section draws a clear distinction between the land and the improvements on or appertaining to the land. And the improvements have to be made or acquired by the owner or his predecessor in title. The improvements pointed to, are, in their Lordships' opinion, clearly physical improvements of one kind or another and not an improvement, or increase, in the value of the bare land. It is these physical improvements and any value directly attributable to and inhering in them that have to be excluded from valuation. Further, it is an over-simplification to say that the values of the surrounding lands have been increased by the existence of the mill and other improvements on the subject land. This is merely one, and it may be a relatively minor, factor in the development of the surrounding district. To give every credit to the company, this may be assumed, in the present case, to be due, among other causes, to the enterprise and management of the company, to capital provided or profits applied (other than that sunk in the physical improvements on the land) in carrying on the business, to ability to find or grow raw material and obtain suitable markets and export facilities, and to its good fortune in attracting a suitable and sufficient amount of labour. In other words, the prosperity of the neighbourhood is due to all that goes with the carrying on of a successful manufacturing enterprise. None of these factors can be regarded as improvements made or appertaining to the land, and it would be an almost impossible task to expect of a valuer to assign to the physical improvements their quota of contribution to the land values of the locality. But in their Lordships' view this would be an irrelevant inquiry. What in their opinion is required in the present case is that the physical improvements, with any value which they attach to the land on which they are situated, be excluded from the valuer's computation. The land will then be valued as land void of buildings but situated in the community with the amenities and facilities which have grown up around it. Their Lordships see no objection in the process of valuation to regarding the land as land situated in a sugar town. The valuer need not shut his eyes to the fact that there is a sugar manufacturing industry in existence, though he is not entitled to value the sugar mill and its accessories situated on the subject land. Their Lordships find themselves in agreement with an illustration given by the learned magistrate in his judgment. "If the undeveloped capital value of a city "power house is being assessed one does not assume a city "without electricity and all the consequences of the lack of "such an amenity."

Any other view would lead to great anomalies and difficulties. If the mill in the present case happened to be outside the town's boundaries (where the Ordinance does not apply) and the rest of the company's land inside the boundaries the influence of the mill and its operations on the value of the land could not be ignored. And if a town be assumed in which several industries are carried on, the proportion which each lends to land values in the town might well be an insoluble problem and in their Lordships' view not one which it is to be assumed the Ordinance intended a valuer to solve.

Reference was made in the course of the argument to *Toohey's Ltd.* v. *Valuer-General*[2] and particularly to the passage already quoted in the judgment delivered by Lord Dunedin. The section of the statute there under consideration is indistinguishable from that in the present case. What was being valued in that case was the unimproved value of the site of premises licensed as a public house. The valuer arrived at the unimproved value by deducting the value of the buildings from the amount that would have been realized if the whole subject had been sold as licensed premises. This was clearly wrong because it left as adhering to the unimproved value that element of goodwill attaching to the premises as such. Particular emphasis was laid by counsel for the company on the sentence in the passage referred to: "They

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[2] [1925] A.C. 439.

"[the improvements] are to be taken not only as non-existent "but as if they never had existed." This should be read, however, with a later passage not yet quoted[3]: "It will be observed "that the value is not what has been sometimes designated by "the expression 'prairie value.' The land must be taken as it "exists at the date of the valuation." Their Lordships are unable to attach any special significance to the words "as if "they had never existed." The words of the Ordinance are as if they "had not been made." Nor can they extract from the judgment any principle that would prevent a valuer in assessing the unimproved value of land from resorting for purposes of comparison to the values of surrounding land at the date of valuation even though these values may have been largely built up by the initiative of the owner of the subject land in developing the neighbourhood.

The Supreme Court set aside the judgment of the learned magistrate. The formal judgment of the Supreme Court sets out the grounds for so doing as follows: "And having found that the "valuer proceeded on wrong principles in that the benefits given "to the neighbourhood by the operations of the sugar mill on "the subject land which continue to be a factor in the value of "that land were not disregarded by him in assessing its value it "is ordered that this appeal be allowed and that the valuation of "£110,493 determined by the magistrate and set out in his "judgment dated October 10, 1953, be set aside and that the "proceedings be remitted to the said magistrate's court to direct "the valuer to make a valuation of the appellant's land itself as "it at present stands with such advantage as it at present "possesses and viewed as bare land without the sugar mill upon "it and without any consideration of the value of the subject land "as including the de facto sugar mill." This gives effect to the opinion of the learned judge of the Supreme Court where he says: "In my opinion, the benefits given to the neighbourhood by the "operations of the sugar mill on the subject land which continue "to be a factor in the value of that land should be disregarded in "assessing its value." In the view of their Lordships the learned "judge has here misdirected himself. It is not the "operations" of the sugar mill that have to be disregarded, but the improvements consisting of the sugar mill and its accessories as physical entities. The learned judge would appear to have been influenced by a passage which he quotes from the majority judgment in the

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[3] [1925] A.C. 439, 443.

Australian case of *McGeoch* v. *Federal Commissioner of Land Tax*.[4] That case was dealing with quite a different set of circumstances and the judgment contains nothing, in their Lordships' opinion, that supports the view of the Supreme Court.

Certain points were raised with reference to government roads on the company's land and to a wharf built by it. There is no evidence before the Board that would entitle their Lordships to say that the magistrate took a wrong view in these matters. Counsel for the appellant was prepared to accept the figure of valuation reached by the magistrate and in their Lordships' view this figure should be affirmed.

Their Lordships will accordingly humbly advise Her Majesty to set aside the judgment of the Supreme Court, and to restore the judgment of the magistrate's court. The respondent must pay the costs of this appeal and of the appeal to the Supreme Court.

Appeal allowed.

Solicitors: *Ranger, Burton & Frost; Murray, Hutchins & Co.*

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[4] (1929) 43 C.L.R. 277.

J. C.*
1957
Dec. 9.

KOFI FORFIE, ODIKRO OF MARBAN . . APPELLANT;

AND

BARIMA KWABENA SEIFAH, KENYASEHENE . . . . RESPONDENT.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa (Gold Coast)—Jurisdiction—Chief Commissioner's Court—Commissioner's appointment rescinded—Judgment delivered without jurisdiction — Nullity — Subsequent appointment — Review — Second judgment in identical terms—Not a nullity—"Judgment" —Inherent power to set aside judgment delivered without jurisdiction—Courts Ordinance (Laws of the Gold Coast, 1936, *c.* 4), *s.* 63; *Sch. III, Ord.* 41, *rr.* 1, 2.

Practice—Order—Recall—Order without jurisdiction—Inherent power of court which made order to set it aside.

By Ord. 41, r. 1, of the "Rules and Orders of Court" contained in the Third Schedule to the Courts Ordinance of the Gold Coast:

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* *Present*: LORD REID, LORD SOMERVELL OF HARROW and THE RT. HON. L. M. D. DE SILVA.

"Any Judge, Magistrate, or other judicial officer, may, upon such "grounds as he shall consider sufficient, review any judgment or "decision given by him (except where either party shall have "obtained leave to appeal . . .), and upon such review it shall be "lawful for him . . . to reverse, vary, or confirm his previous "judgment . . ." And by r. 2: "Any application for review of "judgment must be made not later than 14 days after such "judgment . . .":—

Held, that "judgment" in Ord. 41 means nothing more than an adjudication by a judge upon rights of parties. If made without jurisdiction it would be ineffectual, but the effectiveness or otherwise of the judgment is not relevant to the question whether it is a judgment. Consequently a judge may under Ord. 41 review a judgment delivered by him at a time when he had no jurisdiction and, on such review, give a second judgment. If at the time the second judgment is delivered the judge had jurisdiction then that second judgment is not a nullity.

Accordingly, where a commissioner validly appointed to preside over the Chief Commissioner's Court reviewed under Ord. 41, r. 1, a judgment of his which was a nullity, having been delivered by him on a date when admittedly he had no jurisdiction to act, and on the review delivered a judgment identical in terms with his original judgment, the second judgment was not a nullity.

A further ground for holding that such second judgment was not a nullity is that the court has inherent power to set aside a judgment which it has delivered without jurisdiction. Assuming that the commissioner had no power to review his earlier judgment, he nevertheless had power to declare it a nullity and proceed to give a fresh judgment.

Dictum of Lord Greene M.R. in *Craig* v. *Kanssen* [1943] K.B. 256, 263; [1943] 1 All E.R. 108 applied.

A judge can act of his own motion under Ord. 41, r. 1, without the necessity of an application by a party under rule 2. The latter rule places parties under a limitation as to time without imposing a similar limitation on a judge.

The words "shall have obtained leave to appeal" in Ord. 41, r. 1, relate to the point of time at which final—not conditional—leave is formally granted by the court.

Under section 63 of the Courts Ordinance, which provides that "The Governor may at any time . . . appoint a fit and proper "person to preside over the Chief Commissioner's Court . . .," more than one person can be appointed to function at the same time. Under the relevant law the singular includes the plural, and the word "preside" does not stand in the way of that interpretation—two persons appointed will not sit in the same court at the same time.

Judgment of the West African Court of Appeal reversed.

Appeal (No. 32 of 1952) from a judgment of the West African Court of Appeal (June 28, 1951), which set aside as nullities two judgments given by Mr. A. C. Spooner in the Chief Commissioner's Court of Ashanti on May 10, 1949, and June 29, 1949, respectively.

The following facts are taken from the judgment of the Judicial Committee. The original parties to this action were the predecessors in title of the present appellant and the present respondent. No question arose from the substitution of parties. The terms "appellant" and "respondent" in this report refer to the original parties as well as to the parties who appeared on this appeal.

The respondent instituted this action against the appellant on October 6, 1936, in Divisional Native Court B of Kumasi to recover a tract of land. That court found in favour of the appellant and dismissed the respondent's claim. On appeal to the Asantehene's Court A2 the judgment was reversed and the respondent succeeded. The appellant thereupon lodged an appeal to the Chief Commissioner's Court. Mr. A. C. Spooner, the president of the court at the time, heard the case and delivered judgment in favour of the appellant on May 10, 1949.

There was an appeal from that judgment to the West African Court of Appeal. Two dates relating to that appeal were relevant. The respondent on May 27, 1949, obtained conditional leave to appeal, and final leave to appeal was granted on July 15. His appeal was based on the contention that Mr. Spooner had had on May 10, 1949, no power to exercise judicial functions as, on that day, his appointment to preside over the Chief Commissioner's Court stood rescinded. It appeared from the record that he had also been of that opinion and that, as a result, certain steps were taken which it is convenient to examine at this stage.

It was common ground that appointments to preside over the Chief Commissioner's Court could be and were made by orders signed by the Colonial Secretary and published in the Gazette. When Mr. Spooner heard the case he held office under Order No. 84 of 1948. By Order No. 32 of 1949, signed on May 10, 1949, by the Acting Colonial Secretary, one Mr. Allen was appointed to preside over the Chief Commissioner's Court and Order No. 84 of 1948 was rescinded. By a further Order, No. 42 of 1949, of June 21, 1949, Mr. Spooner was appointed commissioner for the period June 23, 1949, to June 30, 1949. On June 29, 1949, acting under a power to review a judgment conferred by Ord. 41, r. 1, contained in Schedule III of Chapter 4 of the Laws of the Gold Coast, 1936, Mr. Spooner reviewed his judgment of May 10, 1949. He said that he had had no jurisdiction on May 10, 1949, to deliver that judgment and, stating that he was acting under his power to review, he delivered a judgment identical in terms with his original judgment. There was an appeal from that judgment also to the West African Court of Appeal.

The Court of Appeal (Verity Ag.P., Lewey J.A. and Morgan J.) held that the judgment delivered on review on June 29, 1949, must be held to be also a nullity as the judgment of May 10, 1949, was a nullity.

By Ord. 41, in the Third Schedule to the Courts Ordinance:—

"ORDER 41

"REVIEW

"1. Any judge, magistrate, or other judicial officer, may, "upon such grounds as he shall consider sufficient, review any "judgment or decision given by him (except where either party "shall have obtained leave to appeal, or a reference shall have "been made upon a special case, and such appeal or reference is "not withdrawn), and upon such review it shall be lawful for "him to open and re-hear the case wholly or in part, and to take "fresh evidence, and to reverse, vary, or confirm his previous "judgment or decision, or to order a non-suit.

"2. Any application for review of judgment must be made "not later than fourteen days after such judgment. After the "expiration of fourteen days an application for review shall not "be admitted, except by special leave of the court, on such terms "as seem just."

Oct. 29, 30. *Hector Hughes Q.C.* and *J. T. Woodhouse* for the appellant. The question is as to the jurisdiction of Mr. Spooner in the Chief Commissioner's Court of Ashanti on May 10 and June 29, 1949. With regard to May 10, the issue revolves round the meaning of the words "from" and "on." By the Order No. 32 of 1949, signed on May 10, Mr. Allen's appointment to preside in the court was to take effect not "on" but "from" May 10, and "from" on the authorities means from the beginning of the next day. It is submitted, therefore, that May 10, 1949, was excluded from the operation of Order No. 32 of 1949 and that that Order came into force upon the first instant of the next day, May 11, and that consequently Mr. Spooner's judgment of May 10 was valid, since he still held office on that day. The West African Court of Appeal were in error in holding that

Mr. Spooner's authority to exercise judicial power in the Chief Commissioner's Court had been rescinded with effect from May 9. [Reference was made to *Bhugwandeen Doobey* v. *Myna Baee.*[1]] Admittedly, it was conceded by counsel for the present appellant in the court below that the judgment of May 10 was a nullity, but this Board has a discretion to permit the contrary to be argued now, and it should be exercised in the appellant's favour.

J. G. Le Quesne for the respondent. It is a matter of discretion in this sense, that while in view of what happened below it is not impossible for the Board to admit argument on this point, it is not usual to allow a party to go back on a concession after, as here, a lapse of six years.

[Lord Reid said that their Lordships did not think that the case, an unusual one, was one in which their discretion should be exercised, but argument could proceed on the judgment of June 29, 1949.]

Hector Hughes Q.C. There can be no question that Mr. Spooner had jurisdiction under Order 42 of 1949 to deliver the judgment of June 29—he was then in office under that Order. If the judgment of May 10 was a nullity and could not be reviewed, it is submitted that the judgment of June 29, though expressed to be by way of review, was in effect an original judgment which he had jurisdiction to pronounce on that day.

J. T. Woodhouse following. It is conceded that it is impossible to review that which does not exist. Mr. Spooner must have thought that his first judgment was a nullity, and therefore he intended to deliver a fresh judgment, and the judgment he then pronounced was valid and effective as the judgment in the appeal. There appears to be no authority on this point.

J. G. Le Quesne for the respondent. It is submitted first that Mr. Spooner was without jurisdiction on June 29 because Order No. 42 of 1949 of June 21 purporting to appoint him was bad, inasmuch as it is impossible for all the judicial powers and jurisdiction of the Chief Commissioner to be vested in two persons at the same time. Here a court is set up which is to have one judge, and Mr. Allen, whose appointment had not been rescinded. was still in office under Order 32 of 1949 on June 29.

Secondly, on the assumption that Mr. Spooner had jurisdiction on June 29, what on the face of the proceedings he purported to be doing he had no power to do—he had no power to review under Ord. 41 in the Third Schedule to the Courts Ordinance.

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[1] (1867) 11 Moo.I.A. 487, 499.

Taking Ord. 41 as a whole, the scheme is that if a review is possible it is to be upon the application by one of the parties, but here Mr. Spooner purported to review of his own motion. It is to be set in motion in exactly the same way as an appeal. It would be an unusual provision to find the court, having given judgment for the plaintiff, empowered to turn it round and give judgment for the defendant. It was not possible for Mr. Spooner to invoke Ord. 41 on June 29.

Thirdly, Ord. 41, r. 1, says that the judge has power to review "except where either party shall have obtained leave to appeal." Here conditional leave to appeal had been granted; it may be that everything had not been done which was necessary to bring the appeal before the Court of Appeal, but it is submitted that the leave had been given. Obtaining leave means getting a conditional order and fulfilling the conditions; alternatively, it means getting the conditional leave, and so long as the conditional leave is outstanding, then no review can be made.

For the above three reasons, therefore, and quite apart from any effect of the purported review of the nullity judgment of May 10, no review was possible. The terms of Ord. 41, r. 1, however, are such as to make it impossible for a review to take place of a judgment which was itself a nullity, for Ord. 41, r. 1, presupposes an effective order which is capable of alteration. Order 41 is not appropriate to something done without jurisdiction—the judge cannot confirm something which was nothing to begin with. *Craig* v. *Kanssen* [2] is the nearest English case in point—it shows that it is necessary for something to be done in order to set aside an order which is a nullity. It was said in *Hatton* v. *Harris* [3] that "When an error of that kind has been committed, "it is always within the competency of the court, if nothing has "intervened which would render it inexpedient or inequitable to "do so, to correct the record in order to bring it into harmony "with the order which the judge obviously meant to pronounce." If Mr. Spooner's judgment of June 29 is not to be set aside but in some way altered, the alteration is one which can only be of the sort mentioned in *Hatton* v. *Harris*.[3] Here Mr. Spooner has chosen to do something which is described as confirming a nullity. Lastly, as to what is to be done now, see *Chief Kwame Asante* v. *Chief Kwame Tawia*.[4]

Hector Hughes Q.C. replied.

[2] [1943] K.B. 256; [1943] 1 All E.R. 108.

[3] [1892] A.C. 547, 560.

[4] [1949] W.N. 40.

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December 9. The judgment of their Lordships was delivered by The Rt. Hon. L. M. D. de Silva, who stated the facts set out above and continued: It appears from the judgment of the Court of Appeal that the appellant at the hearing of the appeal conceded that the judgment of May 10, 1949, was a nullity. An endeavour was made by counsel for the appellant to argue that upon this point the Court of Appeal had misunderstood counsel. No indication of such an argument is to be found in the "Case "for the appellant." Six years have now passed since the Court of Appeal gave judgment, and their Lordships did not think that this was a case in which such an argument should be permitted. Nor did they find it possible, in the exercise of their discretion, to allow counsel, despite the concession, to argue that the judgment of May 10, 1949, was not a nullity.

Their Lordships are unable to agree with the Court of Appeal that the judgment delivered on review on June 29, 1949, must be held to be also a nullity as the judgment on May 10, 1949, was a nullity. They have reached the conclusion that the judgment of June 29, 1949, was not a nullity upon two separate and independent grounds.

The power to review a judgment is to be found in Ord. 41, contained in the Third Schedule to the Courts Ordinance, which is to the following effect: [His Lordship stated the terms of Ord. 41, rr. 1 and 2, and continued:] This is an extremely wide power and its object is to enable a court, which is of opinion that a judgment or decision given by it is erroneous, to correct the error. If, as argued by the respondent, the term "judgment" must be limited to judgments made with jurisdiction, it follows that the Order enables a court to correct all errors made by it except the error that it has given a judgment which it had no jurisdiction to give. Such a result would be curious. Their Lordships cannot accept the argument. To say that a judgment is a nullity is not to say that the judgment is not a judgment for any purpose, and, in particular, that it is not a judgment within the meaning of the term in Ord. 41. Their Lordships are of opinion that the term in Ord. 41 means nothing more than an adjudication by a judge upon rights of parties. If made without jurisdiction it would be ineffectual, but the effectiveness or otherwise of the judgment is not relevant to the question whether it is a judgment. Consequently a judge may under the Order review a judgment delivered by him at a time when he had no jurisdiction and, on such review, give a second judgment. If at the time the second judgment is delivered the judge had jurisdiction, then that second judgment is not a nullity. That is the position in the present case.

Certain other submissions were made with regard to Ord. 41. It was said that a judge cannot act under rule 1 unless a party applies under rule 2. Their Lordships cannot accept this argument. There is no reason why a judge, acting under Ord. 41, should be precluded, after hearing parties, from correcting an error which he has noticed. What the legislature has done is by rule 2 to place parties under limitation as to time without imposing a similar limitation on a judge. It was argued before the Court of Appeal that where it was intended that a judge should have the right to act of his motion the legislature has expressly said so. Thus, in Ord. 26 the words "either of his "own motion or on the application of either party" occur. Their Lordships are of opinion that, though this argument cannot be said to be without some force, it is not strong enough to defeat the view expressed above.

It was also argued that the words "except where either party "shall have obtained leave to appeal" in rule 1 were applicable because the respondent had at the time of the review obtained conditional leave to appeal and fulfilled the conditions although the court had not granted final leave to appeal. Their Lordships cannot agree. They think "shall have obtained leave to appeal" relates to the point of time at which final leave is formally granted by the court.

It was further argued that the power to review was not exercisable by an appellate tribunal. If this were correct the term "judicial officer" in Ord. 41 would not include judicial officers exercising appellate jurisdiction. Their Lordships can see no reason for taking this view.

It was said that Order No. 42 of 1949, of June 21, 1949, which appointed Mr. Spooner to preside for the period June 23, 1949, to June 30, 1949, was ineffective as Mr. Allen's appointment had not been rescinded. Their Lordships are of the opinion that more than one person can be appointed to function at the same time. Section 63 of the Courts Ordinance is to the following effect: "The Governor may at any time by order under "his hand appoint a fit and proper person to preside over the "Chief Commissioner's Court and such person shall have and "may exercise during the period of such appointment and subject "to the terms thereof all the judicial powers and jurisdiction for "the time being vested in the Chief Commissioner." It is conceded that under the relevant law the singular includes the plural, and consequently "a fit and proper person" includes "fit and "proper persons." Their Lordships do not think that the word "preside" stands in the way of this interpretation. Two persons can be appointed, but as they will not both sit in the same court at the same time no difficulty can arise. Moreover, if only one person can be appointed, the later appointment of Mr. Spooner will prevail over the earlier appointment of Mr. Allen.

Their Lordships will now proceed to the second ground upon which they have come to the conclusion that the judgment of June 29, 1949, was not a nullity. A court has inherent power to set aside a judgment which it has delivered without jurisdiction. Lord Greene M.R. in *Craig* v. *Kanssen*,[1] after referring to several decisions, said: "Those cases appear to me to establish that "a person who is affected by an order which can properly be "described as a nullity is entitled ex debito justitiae to have it "set aside. So far as procedure is concerned, it seems to me "that the court in its inherent jurisdiction can set aside its own "order, and that it is not necessary to appeal from it."

Their Lordships are of the same opinion. Assuming that the judge had no power on June 29, 1949, to review his judgment of May 10, 1949, he nevertheless had power to declare it a nullity and proceed to give a fresh judgment. This in fact he did, and the only criticism of the proceedings of June 29 that could be made is that on a question of procedure he attributed the authority to do the thing he did to a source from which it did not flow. But although the source named was, on the assumption made, incorrect, he undoubtedly had power to do the thing he did. No other error can be said to have been committed. Such an error does not, in their Lordships' opinion, vitiate the act done. It follows that the judgment of June 29, 1949, was not a nullity.

Morgan J., who delivered the judgment of the West African Court of Appeal, with which the others concurred, said: "The "appeal against the reviewed judgment of June 29, 1949, has "not yet come before this court"; but he has pronounced upon the question whether or not the judgment of June 29, 1949, is a nullity. He said "the reviewed judgment must also in my "view be declared a nullity." And under the heading "Court "Notes of Judgment" the formal order made is: "Appeal "allowed. Judgment of C.C.A. set aside as a nullity. Reviewed "judgment also declared a nullity. No order as to costs." That view and that order stand in the way of the appeal from the judgment of June 29, 1949, being proceeded with. Their Lordships

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[1] [1943] K.B. 256, 262.

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will therefore humbly advise Her Majesty that this appeal be allowed and the case sent back to the Court of Appeal of Ghana to deal with such other points as arise on the appeal from the judgment of June 29, 1949, on the basis that that judgment is not a nullity although the judgment of May 10, 1949, is a nullity. The respondent must pay the appellant's costs of this appeal and of the hearing before the West African Court of Appeal.

Solicitors: *A. L. Bryden & Williams; Waterhouse & Co.*

C. C.

[HOUSE OF LORDS.]

H. L. (E.)*
1957
Feb. 25, 26, 27, 28;
Apr. 4.

MID-NORTHAMPTONSHIRE WATER BOARD APPELLANTS;

AND

LEE (VALUATION OFFICER) . . . . RESPONDENT.

Rates and Rating—Assessment—Rateable value—Profits basis—Statutory water undertaking — Sums raised by precept to meet loan charges—Whether taken into account in assessing net annual value.

A statutory water board operating in 14 rating areas and assessed for rating purposes on the "profits basis" derived its revenue partly from water charges on consumers and partly from precepts levied on the local authorities of the areas in which it operated. Under the terms of its private Act it had to make estimates of its revenue and expenditure for the forthcoming year but could not allocate any particular part of its revenue to any particular purpose, as all receipts had to be carried to a common fund out of which all expenses had to be defrayed. In January, 1951, the board estimated that in its forthcoming financial year (April 1, 1951, to March 31, 1952) it would have to find £9,515 loan charges on uncompleted works not yet in beneficial occupation and it included that sum in the precepted total of £66,170 levied in respect of that year to meet anticipated deficiencies in revenue. The inclusion of the sum of £9,515 in the estimated expenditure arose from the anticipation that the board would spend in the relevant year £328,550 on works in course of construction, but in fact only £112,167 was spent, and accordingly the amount required for loan charges was only £3,365. It was contended, on behalf of the board, that this sum should be omitted from the gross receipts in the calculation of the cumulo net annual value of the undertaking for rating purposes:—

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* *Present*: Lord Morton of Henryton, Lord Radcliffe, Lord Cohen, Lord Keith of Avonholm and Lord Evershed.

Held, that in applying the profits basis, approved in *Kingston Union Assessment Committee* v. *Metropolitan Water Board* [1926] A.C. 331; 42 T.L.R. 275 as a method of valuation, the board's revenue from precepts should be taken into account without deductions for loan charges on uncompleted works not yet in beneficial occupation and without regard to the estimates prepared for the purpose of calculating the amount of the precepts. The question to be considered was what revenue could be obtained from a hypothetical tenant for his occupation of the hereditaments to be valued, and all the receipts from the precepts formed part of that revenue.

St. James' and Pall Mall Electric Light Co. Ltd. v. *Westminster Assessment Committee* [1934] A.C. 33; 50 T.L.R. 75 applied.

Aberdeen Magistrates v. *Aberdeen Assessor,* 1927 S.C. 458 approved.

Metropolitan Water Board v. *St. Marylebone Assessment Committee* [1923] 1 K.B. 86 and *Manchester Corporation* v. *Bolton Area Assessment Committee* (1930) 144 L.T. 570 overruled.

Decision of the Court of Appeal [1956] 2 Q.B. 55; [1956] 2 All E.R. 59 affirmed.

APPEAL from the Court of Appeal (Denning, Morris and Parker L.JJ.).

This was an appeal from an order of the Court of Appeal dated March 27, 1956, whereby an appeal by the respondent, William Harold Lee, valuation officer for the Wellingborough Urban District Rating Area, on a case stated by the Lands Tribunal, pursuant to section 3 (4) and (11) of the Lands Tribunal Act, 1949, and R.S.C., Ord. 58B, was allowed. He was appointed by the Commissioners of Inland Revenue pursuant to the Local Government Act, 1948, which transferred to valuation officers the duty of preparing and amending rating valuation lists. The appeal arose out of proposals to alter the valuation list in respect of the net annual and rateable values of part of the undertaking of the appellants, the Mid-Northamptonshire Water Board, in the Wellingborough Urban District. The appellants were a body formed by the amalgamation of several water undertakings previously supplying water in various parts of the county of Northampton, including Wellingborough.

The facts, stated by Lord Morton of Henryton, were as follows: The hereditaments occupied by the board extended into 14 rating areas. The proceedings in which this appeal arose related only to hereditaments in the Wellingborough Urban District Rating Area, and originated in two proposals, one made on September 29, 1952, by the valuation officer and the other on March 26, 1953, by the board, for alterations in the values attributed in the valuation lists to these hereditaments. It was, however, agreed between the parties, when the matter came before the Lands Tribunal on appeal from the Local Valuation Court, that the tribunal should decide in the first instance the cumulo net annual value for the whole of the hereditaments comprised in the undertaking of the board. The tribunal having given its decision, the parties agreed the values which, on that basis, should be attributed to the hereditaments to which the said two proposals related; the tribunal then ordered that the assessments of those hereditaments should be determined accordingly. The Court of Appeal allowed an appeal by the valuation officer, held that the cumulo value had been wrongly decided by the Lands Tribunal, set aside the order of the tribunal and remitted the case to the tribunal, but the revised values of the particular hereditaments in question were determined, pending the appeal to the House of Lords.

The board came into existence on July 1, 1949, under the Mid-Northamptonshire Water Board Order Confirmation (Special Procedure) Act, 1949, confirming the Mid-Northamptonshire Water Board Order, 1948. Under this Order, during the period from July 1, 1949, to March 31, 1954, the revenue of the board was to be derived partly from charges made to consumers in accordance with the enactments relating to the supply of water previously applicable in the various areas within the board's limits of supply, and partly from "precepts" issued under clause 29 of the Order. After March 31, 1954, the whole of the board's revenue (except charges for water supplied for non-domestic purposes) was to be derived from such precepts.

The board's financial year ended on March 31 in each year. It was the duty of the board to make, before the beginning of each financial year, estimates of its probable revenue and expenditure (other than capital expenditure) during that year, including any credit or debit balance carried forward from any previous year. If those estimates showed that the expenditure would exceed the revenue, it was the duty of the board to apportion (on a basis laid down by the Order) the sum required to meet the deficiency in revenue among the local authorities whose districts were covered by its undertaking, and to issue to each of such authorities, before the beginning of the financial year in question, a precept for a sum equal to the amount so apportioned to that authority; each authority was bound to pay to the board within two months after the commencement of the year (or by such instalments as might be specified in the precept) the sum stated in the precept.

The Order contained no provision for the separation of any part of the revenue of the board for any specific purpose, and clause 27 provided that, except as otherwise expressly provided, all the receipts of the board should be carried to a common fund and all expenses incurred by the board defrayed out of that fund. By clause 30 all moneys received by the board in respect of its undertaking, including amounts brought forward from any previous year (except certain specified moneys of a capital nature), must be applied for specific purposes in a specified order of priority. Those purposes included the extension, improvement and construction (if the board thought fit) of any works for the purpose of the undertaking. Any credit or debit balance remaining over in any year, including any balance brought forward, must be carried forward to the following year.

In the Lands Tribunal and the Court of Appeal the accounts of the board to which reference was made by both parties as the basis of the valuations on which they relied were those for the year ended March 31, 1952; a copy of the board's "abstract of "accounts" for that year was annexed to the case stated. The estimates of revenue and expenditure for that year were made in January, 1951, and showed that expenditure was estimated to exceed revenue (including balance brought forward) by £66,170; in these estimates there was included in the expenditure an amount of £9,515, which it was anticipated would be required for the purpose of paying loan charges in respect of capital expenditure on works not yet in beneficial occupation. The board accordingly issued to the appropriate local authorities precepts for a total amount of £66,170 and received that sum from them during the year.

The revenue in fact received by the board in the year ended March 31, 1952, included £195,148 revenue from water charges and the said sum of £66,170 from precepts, a total of £261,318. The "surplus and deficiency account" included in the "abstract "of accounts" showed that a sum of £30,193, described as "excess of precept income carried forward," was brought forward from the previous year, but neither party included any part of that sum in the "gross receipts" for the purposes of their respective valuations. During the year ended March 31, 1952, the expenditure in fact exceeded the revenue, with the result that the "excess of precept income" carried forward at the end of the year was only £13,651, a reduction of £16,542 as compared with the sum brought forward at its beginning.

The inclusion in the estimated expenditure for the year ended March 31, 1952, of the said sum of £9,515 arose from the anticipation of the board, when the estimates were made in January, 1951, that £328,550 would have to be spent in that year on works in course of construction. In fact, however, only £112,167 was so spent, and the amount required for loan charges was only £3,365 instead of £9,515.

Michael Rowe Q.C. and *William Roots* for the appellant board. The whole object is to get at the value of the rated hereditament which the hypothetical tenant is actually occupying. It is agreed that the net annual value of the hereditament must be established by means of the profits basis as approved in *Kingston Union Assessment Committee* v. *Metropolitan Water Board.*[1] But that basis is only a means to an end. If it is so applied as to produce more than the net annual value, i.e., to produce a net annual value which is not only the net annual value of the hereditaments in the occupation of the appellants but also what will be the net annual value of hereditaments not yet in beneficial occupation, something must have gone wrong with its application. The House has never before had to consider this problem of the effect of precepts for new works. The description of the profits basis, its aims and its origins are more consistent with the appellants' contentions than with what the Court of Appeal said was the necessary consequence of certain previous decisions. Where money is raised and expended on purposes which have no connexion with the hereditament which the appellants are constructing, it must be eliminated from calculations on the profits basis. It is revenue of the appellants in their capacity as hypothetical tenants that is to be taken into consideration, not all their income.

Aberdeen Magistrates v. *Aberdeen Assessor* [2] is distinguishable because there the revenue in question arose from ordinary charges to consumers for electricity sold to them, whereas here the £3,365 was part of a sum raised by precept. It is not now contended that the whole of the £9,515 should be omitted from the gross receipts, and it is not sought to contend that *Metropolitan Water Board* v. *St. Marylebone Assessment Committee* [3] was rightly decided. But *Manchester Corporation* v. *Bolton Area Assessment Committee* [4] is relied on and is distinguishable from it. Though the reasoning is wrong in so far as it was sought to rely on the former case, the decision was right. As here, the sums sought to be deducted from the gross receipts were expended to meet interest on loans in respect of works not yet completed.

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[1] [1926] A.C. 331; 42 T.L.R. 275.

[2] 1927 S.C. 458.

[3] [1923] 1 K.B. 86.

[4] (1930) 144 L.T. 570, 575, 577.

In the *Kingston* case [5] is to be found the classic exposition of the profits basis. What was done in the present case by the Court of Appeal was just what Lord Cave said [6] the profits basis was designed to prevent.

The leading case on apportionment is *Reg.* v. *West Middlesex Waterworks Proprietors*,[7] which fills in the idea at the back of the profits basis, then in process of evolution. Apportionment is an essential part of the profits basis. See also *Reg.* v. *South Staffordshire Waterworks Co.*,[8] a case where the works in occupation were larger than were required for the purposes of the company. It appears that one would not take into account works not yet part of the undertaking. *Dewsbury and Heckmondwike Waterworks Board* v. *Penistone Union Assessment Committee* [9] does not support the idea that one is to assume that the hypothetical tenant would have power to raise money in relation to other property. The appellants have no quarrel with this case. Little help is to be derived from *Merthyr Tydfil Local Board of Health* v. *Merthyr Tydfil Assessment Committee* [10] save for what is said towards the end of the judgment.[11] This case is in the appellants' favour rather than against them, for the court recognized that one must dissect the accounts to see what really are the true receipts of the hypothetical tenant from the property which he occupies—whether they arise from the hereditament and therefore can be included in the assessments.

The appellants would like to support the *St. Marylebone* case,[12] but in view of *St. James' and Pall Mall Electric Light Co. Ltd.* v. *Westminster Assessment Committee* [13] that is not possible. However, the latter case does not affect their argument here, because in that case there was no question of uncompleted works or loan charges in respect of them.

Since the whole object of the profits basis is to get the value of the rated hereditament, a revenue-raising power with no relation to the rated hereditament must be excluded. The logical ratio of the *Manchester* case [14] is the exclusion of unoccupied hereditaments. Here the works under construction are not in beneficial occupation and are not rateable. Revenue raised by precept to meet loan charges on such works does not stem from the occupation of works already constructed and in beneficial occupation and is revenue of the hypothetical landlord. The only revenue potentially available to the hypothetical tenant of the rateable hereditament is that which he can obtain by reason of his occupation of that hereditament. The revenue from precept in issue here is not revenue which the hypothetical tenant did so obtain, but revenue of the hypothetical landlord. The fact that the hypothetical landlord is constructing new works and incurring loan charges thereon cannot increase the rateable value of the existing works let by him to the hypothetical tenant. Until the works are completed, there can be no hypothetical tenant, for until then there is nothing to let. An uncompleted house or factory cannot be rated until there is beneficial occupation.

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[5] [1926] A.C. 331, 338–339, 347.

[6] Ibid. 342–343.

[7] (1859) 1 E. & E. 716.

[8] (1885) 16 Q.B.D. 359, 369, 373; 2 T.L.R. 193.

[9] (1885) 16 Q.B.D. 585; (1886) 17 Q.B.D. 384, 386–387.

[10] [1891] 1 Q.B. 186, 191–192.

[11] Ibid. 193.

[12] [1923] 1 K.B. 86.

[13] [1934] A.C. 33; 50 T.L.R. 75.

[14] 144 L.T. 570.

The *St. James'* case [15] was relied on by the Court of Appeal, but it is distinguishable from the present case. There the whole receipts were from electricity; there was no question of a precept or a rate. Also there was no question of uncompleted works. It was clear that the rent was to be calculated from the undertaking as it was. It was a straightforward case of a hypothetical tenant with power to charge up to so much for the services which he supplied. The issue there arose from the fact that the sinking funds in question were to provide, not for the replacement of physical assets when worn out, but compensation to the owner-occupiers on the compulsory acquisition of their undertaking. But, though of a peculiar kind, they were still sinking funds; they were built up from revenue raised by charges on the consumption of electricity supplied by and from the company's occupied hereditaments. The revenue stemmed only from the use and occupation of the company's rateable hereditaments. In that case the House only said that the revenue so derived under those particular statutory powers was received by the hypothetical tenant and available in his hands to satisfy his liabilities, whatever they might be, and must be treated as his receipts. The facts of the present case were fundamentally different.

Certain Scottish cases are of very great help in illustrating the principle of the *St. James'* case,[15] in particular *Aberdeen Magistrates* v. *Aberdeen Assessor* [16] and *Edinburgh Parish Council* v. *Assessor of Railways and Canals* [17] therein referred to. Both of these are correct, but are distinguishable from the present case because the sums applied to loan charges on uncompleted works were raised out of ordinary charges for services levied on consumers. The same amount of money could have been raised by the hypothetical tenant in each case, whether or not the loan charges existed.

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[15] [1934] A.C. 33.

[16] 1927 S.C. 458.

[17] (1925) Poor Law and Local Government Magazine, June, 1925, Reports of Cases, p. 140.

Fife Assessor v. *Dunfermline District Committee of Fife County Council* [18] and *Stirlingshire Assessor* v. *Stirlingshire and Falkirk Water Board* [19] show that even if, on the ordinary application of the profits basis, the sum now in question could be included in the gross receipts of the undertaking, the present case should be treated as exceptional and there should be some modification of the application of the profits basis.

The *Kingston* case [20] establishes that the object of the valuation is to get at the rent of the rateable hereditament. The profits basis normally provides the method by which that rent can be estimated so as to ensure that the sum of the values placed on the parts does not exceed the true value of the whole. But from the observations of the judges who decided the *Kingston* case [20] it appears that the profits basis is merely a measure of rent, a servant, not a master. When reference is there made to the profits earned by "the whole undertaking," what is meant is the totality of the rateable hereditaments presently occupied by the undertakers. If it is wrong to let the aggregate of the parts exceed the value of the whole, it is also wrong to let the value of the whole be affected by facts which relate to property which is not even part of the whole, viz., the rateable hereditament. The profits basis being an economic theory of rent, one must begin with the revenue derived from the subjects to be valued or from any powers exercisable by the hypothetical tenant to raise revenue by rates or otherwise in respect of those subjects, e.g., for repairs. If the profits basis were to include anything beyond that, it would cease to be an economic theory of rent. The totality of the rent from that source (the rateable hereditament or the powers just mentioned) is the starting point. Revenue from other sources must be disregarded. In the *St. James'* case [21] and the *Aberdeen* case [22] the whole rent derived directly from the subjects to be valued. When you have a power to rate or to precept to meet expenditure of any kind, other than capital expenditure, incurred in respect of those subjects, then the revenue raised is raised in respect of those subjects and must be included as receipts from the rated hereditament. But that general rule is subject always to the further rule that effect must be given to statutory provisions or restrictions affecting the particular power or undertaking.

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[18] 1929 S.C. 304, 311–313.

[19] 1931 S.C. 369.

[20] [1926] A.C. 331.

[21] [1934] A.C. 33.

[22] 1927 S.C. 458.

It follows that revenue of an undertaking which does not arise out of or in respect of a rated hereditament must be disregarded. Works still under construction are not part of the rated hereditament, for they are not in the beneficial occupation of anyone. Under clause 29 of the Mid-Northamptonshire Water Board Order the appellants in their capacity as hypothetical tenants would have had no power to include in their estimate of expenditure any sums to be expended on meeting loan charges on works not in their notional occupation as tenants during the relevant year and not forming part of the rateable hereditament. The appellants are landlords not only of the water undertakings but also of farms, yet the hypothetical tenants, for the purposes of the profits basis, have nothing to do with them or with uncompleted works. Only revenue of the appellants as hypothetical tenants can be included in the calculation.

If the Court of Appeal were right, the very fact that you were constructing new works and had to pay loan charges would increase your rates, because if the net annual value was increased the rates would be increased. Then the cost of the works would be correspondingly increased and more money would have to be raised.

Rates are a tax, not on income or profits, but on rental values. Premises which cease to be occupied cease to be rateable, however much money is spent on them. The decision of the Court of Appeal results in attributing to the hereditament a net annual value which could never be achieved unless there were additional works in course of construction and loan charges thereon. Either the profits basis is wrong or the usual formula requires modification.

The Court of Appeal has wrongly applied the profits basis in that the power to raise the £3,365 in question here was a power not exercisable in respect of the rated hereditament. The power to precept for those charges was a landlord's power under clause 29 of the Order and the hypothetical tenants had nothing to do with them. Alternatively, if it is to be assumed that the hypothetical tenant is the only person with the right to precept, it must be assumed that he was acting under some separate contract with his landlord. Payments in respect of property not the subject of the tenancy are not rent. On the present facts the formula requires modification. The money was raised and spent without increasing the value of the rated hereditament.

Although the whole revenue of the appellants was paid into an account from which all the expenditure was paid, the conceptions of hypothetical landlord and hypothetical tenant must not be abandoned for rating purposes. One must dissect the accounts to distinguish between their respective contributions and expenditure. For this purpose it is legitimate to consider the estimates as indicating the purposes for which the revenue was raised so as to determine, by reference to those purposes, to what extent that revenue would be potentially available to the hypothetical landlord and the hypothetical tenant respectively. Here the £3,365 was raised and expended for landlord's purposes, viz., the payment of loan charges on works forming no part of the rateable undertaking, and should accordingly be disregarded in estimating the hypothetical tenant's receipts. The undertaker's gross receipts would never have been as large as they were if this sum had not been raised by precept to meet the loan charges for the uncompleted works.

Cyril Harvey Q.C. and *Patrick Browne* for the respondent. The whole of the sum in question should be included in the gross receipts. The profits basis is a formula for valuation based on the provisions of the Parochial Assessments Act, 1836 (re-enacted in substance by the Rating and Valuation Act, 1925), and calculated to adapt those provisions to a complex undertaking such as a water company, having rateable hereditaments in a number of different rating areas, by using the profits earned by the undertaking as a whole as a measure for determining the " cumulo " value, i.e., the rent which a hypothetical tenant would pay for the right to occupy all the hereditaments comprised in it and to work the undertaking for his own profit. It is no use going to such hereditaments as one may find in any rating area. A water main may pass through a rating area and in itself have no value to a tenant, while to a landlord who owned the rest of the works it would have an enormous value, so that he would not let it for less than an immense rent. In rating a shop in Victoria Street one does not find whether the occupier has had a good or a bad year. But in the case of an undertaking such as this, one looks at the whole concern as a profit-earning organization. Having found what it is capable of earning, one distributes that amount among the hereditaments of which it consists. One finds the receipts of the undertaking and, if one adopts the profits basis at all, one must adopt it as a whole, not taking out divers factors: see *Clayton* v. *British Transport Commission*.[23] The appellants have sought to put on Lord Cave's words in the *Kingston* case [24] a meaning which he did not intend, but see what he says as to the cardinal principles on which hereditaments are assessable.[25] *Port of London Authority* v. *Orsett Union Assessment Committee* [26] shows what the hypothetical tenant is tenant of. His tenancy includes not merely the physical hereditaments but also the rights and powers that go with them. He is envisaged as a tenant, not a licensee or lodger, and has a right of exclusive possession. The major fallacy of the appellants is to say that the revenue from the precept in issue was revenue of the hypothetical landlord and not the hypothetical tenant. All a hypothetical landlord gets is rent, with no right to possession. There is no such thing as revenue of a hypothetical landlord: see the *St. James'* case [27] and *Railway Assessment Authority* v. *Southern Railway Co.*[28] Only by saying that there is such a thing as revenue of the hypothetical landlord can the appellants make any case. They are trying to divide the precepting power between the hypothetical landlord and the hypothetical tenant. The profits basis may force one to odd results, but it must be adopted: *Barking Rating Authority* v. *Central Electricity Board*.[29]

As to the *Fife* case,[30] on which the appellants founded, what Lord Sands there suggested was wrong. That case and the *Stirlingshire* case [31] were both exceptional. The *Aberdeen* case [32] and the *Edinburgh Parish Council* case [33] are to be distinguished from the present case and any English case without any suggestion that they were wrongly decided. In each case there was a disturbance of the ordinary relationship of landlord and tenant by the intervention of a third party. The *St. Marylebone* case [34] is conceded by the appellants to be wrong, and the *Manchester* case [35] must fall with it.

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[23] [1955] 1 W.L.R. 504; [1955] 2 All E.R. 274.

[24] [1926] A.C. 331.

[25] Ibid. 338.

[26] [1920] A.C. 273, 304–305; 36 T.L.R. 233.

[27] [1933] 1 K.B. 605, 607–608, 639, 640; 49 T.L.R. 159; [1934] A.C. 33, 41–42.

[28] [1936] A.C. 266, 280; 52 T.L.R. 237; [1936] 1 All E.R. 26.

[29] [1940] 2 K.B. 51; 56 T.L.R. 583; [1940] 2 All E.R. 341; (C.A.) [1940] 2 K.B. 493, 495; 56 T.L.R. 928; [1940] 3 All E.R. 477.

[30] 1929 S.C. 304, 311–313.

[31] 1931 S.C. 369, 377.

[32] 1927 S.C. 458.

[33] Poor Law and Local Government Magazine, June, 1925, Reports of Cases, p. 140.

[34] [1923] 1 K.B. 86.

[35] 144 L.T. 570.

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Both parties agree that the *Kingston* case [36] establishes that the object of the valuation is to get at the rent of the rateable hereditament and that the profits basis is normally the method to be adopted, but the appellants' propositions leave open the question: What is the true value of the whole hereditament?: see the *Southern Railway* case [37] and the *St. James'* case.[38]

One goes to the accounts to find the revenue of the undertaking. One must then consider how much of the revenue a tenant would require to keep for himself to induce him to embark on the enterprise. What is left is taken as the rent for the premises and the privileges that go with them. Then one looks at the particular hereditament, say a pumping station or a booster station, to find their annual value. In dealing with the particular hereditament the measure is the cumulo value, and the method of finding the cumulo value is, in the first place, to find the revenue of the whole undertaking: see the *Kingston* case.[39] The subjects to be valued are the entire concern. The appellants are confusing the measure with the thing to be measured, the manner of raising revenue with its purpose. The *Merthyr Tydfil* case [40] shows that the hypothetical tenant is tenant of all the physical assets along with all the powers going with them, whether the undertaking is making its money by sales or obtaining it by precept. In order to say that revenue not arising from the rated hereditament must be disregarded, the *Aberdeen* case [41] must be held to be wrong.

The governing principle is that if one adopts the profits basis, one must take it whole and recognize that the hypothetical landlord is a landlord, not a licensor or a co-adventurer, while the hypothetical tenant is a tenant and not a licensee, so that all the hypothetical landlord can receive is rent.

The deductions to be made from the gross receipts in arriving at the cumulo value are limited to (1) the expenses of earning them, (2) the share of the profits of the undertaking which the hypothetical tenant would require as his own individual profit, and (3) the other deductions specified in the Act on which the formula is based. These deductions do not include loan charges on capital expenditure. No question arises as to the way in which the hypothetical landlord will spend any part of his own share of the profits of the undertaking, for that does not concern the hypothetical tenant.

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[36] [1926] A.C. 331.

[37] [1936] A.C. 266, 284–285.

[38] [1934] A.C. 33, 42.

[39] [1926] A.C. 331, 350.

[40] [1891] 1 Q.B. 186, 192.

[41] 1927 S.C. 458.

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Michael Rowe Q.C. in reply. As to the method of carrying out the apportionment, see Ryde on Rating, 10th ed., pp. 383–384. Admittedly sometimes the application of the profits basis produces strange results, but one should not accept an illogicality unless one is forced to it. The respondents have misinterpreted the *Kingston* case [42] and the *Port of London Authority* case.[43]

There is no authority in England or Scotland in which money raised to pay loan charges on uncompleted works has been brought into the gross receipts of the undertaking unless the powers would have enabled the sums to be raised whether the charges existed or not. One does not pay rent for something of which one is not tenant.

The respondents relied on the *Barking* case [44] to suggest that the profits basis is sacrosanct; but it did not suggest that there can never be any modification of the profits basis.

Even taking the profits basis strictly, the £3,365 is no part of the gross profits of the undertaking.

The respondents also relied on *Railway Assessment Authority* v. *Southern Railway Co.*,[45] but that case is in favour of the appellants rather than against them.

Their Lordships took time for consideration.

April 4. LORD MORTON OF HENRYTON. My Lords, the question arising on this appeal is how the method of valuation approved by your Lordships' House in *Kingston Union Assessment Committee* v. *Metropolitan Water Board* [1] and generally known as " the profits basis " should be applied in the circumstances of the present case.

The respondent is the valuation officer for the Wellingborough Urban District Rating Area. He was appointed by the Commissioners of Inland Revenue pursuant to the Local Government Act, 1948, which transferred to such valuation officers the duty of preparing and amending rating valuation lists; he is hereafter referred to as " the valuation officer." The appellants are a body formed by the amalgamation of a number of water undertakings previously supplying water in various parts of the county of Northamptonshire, including Wellingborough, and are hereafter referred to as " the board."

It is convenient to turn at once to the exposition of the profits basis as a method of valuation which was given by Viscount

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[42] [1926] A.C. 331, 338–339.

[43] [1920] A.C. 273, 305–306.

[44] [1940] 2 K.B. 493.

[45] [1936] A.C. 266.

[1] [1926] A.C. 331; 42 T.L.R. 275.

Cave L.C. in the *Kingston* case.[1] The Lord Chancellor pointed out the difficulty of applying to a body supplying water in a number of different parishes and having in those parishes reservoirs, mains and other property necessary for the purposes of its undertaking, the "cardinal principle" that the rateable value of a hereditament is the rent at which it might reasonably be expected to let from year to year on certain assumed terms, and continued [2]: "The mains and other works in any particular "parish, taken by themselves, might conceivably produce no "rent at all, for it is almost impossible to suppose that any "person would wish to become the tenant of them; but the same "hereditaments, if looked upon as part of a great undertaking "extending over a large and populous area, might be quite indispensable to the undertakers (who must be regarded as possible "tenants) and so might command an extortionate rent. In "these circumstances it was desirable, in order that a fair assessment might be arrived at, to devise some formula which, while "allowing a fair value to the hereditaments in each parish, would "not compel the undertakers to pay rates on an aggregate sum "exceeding the whole yearly value of their undertaking; and "accordingly rating surveyors, soon after the passing of the "[Parochial Assessments] Act of 1836, began to assess waterworks and other like concerns, such as railways, canals, gasworks, etc., upon the basis of the profits earned by the whole "undertaking. From the gross receipts of the undertakers for "the preceding year they deducted working expenses, an allowance for tenant's profit, and the cost of repairs and other "statutable deductions, and treated the balance remaining "(which would presumably represent the rent which a tenant "would be willing to pay for the undertaking) as the rateable "value of the entire concern. It was then necessary to distribute this rateable value among the various parishes into which "the undertaking extended." The Lord Chancellor then described the method adopted for this purpose, and continued [3]: "Thus, a series of assessments was reached which, while giving "to each individual parish a fair proportion, based upon the "hereditaments which it contained and the revenue which it produced, of the total rateable value, did not in the aggregate "exceed the rental which the undertakers or any other possible "tenants might be expected to pay for the whole undertaking "in any year."

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[1] [1926] A.C. 331.

[2] Ibid. 338–339.

[3] Ibid. 339.

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My Lords, it is common ground between the parties that the method of valuation to be applied is the method approved in the *Kingston* case[4]; the controversy has related only to the ascertainment of "the rent which a tenant might be expected to pay "for the whole undertaking," or "the rateable value of the "entire concern" (generally known as "the cumulo value"), and now relates only to one element in the ascertainment of the cumulo value, namely, the "gross receipts." The moneys in fact received by the board in the relevant year, the year ended March 31, 1952, included £66,170 received pursuant to "precepts" issued by the board to various local authorities under its statutory powers. The valuation officer contends (and the Court of Appeal held) that the whole of this sum of £66,170 should be included in the gross receipts. The board contends that this sum should be reduced by £3,365, for reasons which I shall state after setting out the relevant facts.

[His Lordship stated the facts and continued:] Before the Lands Tribunal the board contended that the whole of the sum of £9,515 should be excluded from the gross receipts, and relied on the decision of a Divisional Court of the King's Bench Division in *Manchester Corporation* v. *Bolton Area Assessment Committee and Little Hulton Urban District Council*,[5] in which the previous decision of a Divisional Court in *Metropolitan Water Board* v. *St. Marylebone Assessment Committee*[6] was followed. This contention succeeded before the tribunal, but the Court of Appeal rejected it, holding that the *Marylebone* case[6] and the *Manchester* case[7] were wrongly decided and should be overruled.

In his opening speech in this House Mr. Rowe stated that he would not pursue the contention that the whole of the £9,515 should be omitted from the gross receipts, and would not try to support the decision in the *Marylebone* case.[8] He would, however, submit that the decision in the *Manchester* case[9] was correct, and that the £3,365 actually spent on loan charges on works in course of construction should be excluded from the gross receipts.

Counsel put his submission as follows. He submitted that in applying the profits basis, which is an economic theory of rent, one must begin with revenue to be derived from the subjects whereof the rental value is to be ascertained, or from any powers exercisable by the hypothetical tenant to raise revenue, for repairs or otherwise, in respect of those subjects. Revenue which does not come from either of these sources is to be disregarded. Works still under construction are not part of the rated hereditament, as they are not in the beneficial occupation of anyone. The board in its capacity of hypothetical tenant would have no power under clause 29 of the Order of 1948 to include in its estimate of expenditure sums to be expended to meet loan charges on works not in its notional occupation as tenant during the year in question, and not forming part of the rateable hereditaments. These sums are raised by the board in its capacity as landlord and the hypothetical tenant has nothing to do with them. It is true that the whole revenue of the board is paid into one account and all expenditure is paid from it, but this does not mean that for rating purposes the conception of a hypothetical landlord and a hypothetical tenant must be abandoned. The account must be dissected with a view to distinguishing between their respective contributions and expenditure, and in order to do this it is legitimate to have regard to the estimates, as indicating the purposes for which revenue was raised, in order to determine by reference to such purposes to what extent such revenue would be potentially available to the hypothetical landlord and the hypothetical tenant respectively. In this case it is clear that the sum of £3,365 was raised and expended for landlord's purposes, namely, the payment of loan charges on works forming no part of the rateable undertaking. It should therefore be disregarded in estimating the receipts of the hypothetical tenant.

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[4] [1926] A.C. 331.
[5] (1930) 144 L.T. 570.
[6] [1923] 1 K.B. 86.
[7] 144 L.T. 570.
[8] [1923] 1 K.B. 86.
[9] 144 L.T. 570.

Finally, Mr. Rowe submitted that even if, on the ordinary application of the profits system, the sum now in question would be included in the gross receipts of the undertaking, the present case ought to be treated as an exceptional one and some modification ought to be made in the application of the profits system to it.

My Lords, I shall later give separate consideration to Mr. Rowe's final point, but, in my view, the rest of his argument is inconsistent with the application of the profits basis as it was stated in the *Kingston* case [10] and as it was applied in this House in the case of *St. James' and Pall Mall Electric Light Co. Ltd.* v. *Westminster Assessment Committee.*[11] The argument is in substance the same as part of the argument which was presented, without success, by Mr. Wilfrid Greene K.C. (as he then was) in the *St. James'* case [12]; and a similar argument had already been rejected in Scotland in the case of *Aberdeen Magistrates* v. *Aberdeen Assessor*,[13] which was, in my opinion, rightly decided.

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[10] [1926] A.C. 331.

[11] [1934] A.C. 33; 50 T.L.R. 75.

[12] [1934] A.C. 33, 39.

The position of the hypothetical tenant was stated as follows by Lord Buckmaster in *Port of London Authority* v. *Orsett Union Assessment Committee*[14]: "The actual hereditament of which "the hypothetical tenant is to be determined must be the "particular hereditament as it stands, with all its privileges, "opportunities and disabilities created or imposed either by its "natural position or by the artificial conditions of an Act of "Parliament." The whole of the revenue from precepts in the present case was simply part of the revenue derived by the board in the year in question from the privileges thus described by Lord Buckmaster, and forms part of the gross receipts of the board for that year.

I find myself in entire agreement with the following passage from the judgment of the Court of Appeal in the present case, delivered by Denning L.J.[15]: "It seems to us to be quite wrong "to bring into the 'profits basis' any of the estimates which "are prepared for the purpose of calculating the amount of the "precepts. The estimates are not binding on the board. Once "they issue the precepts and get the money, they can use it as "they like, provided, of course, that they use it for the board's "purposes. No part of it is earmarked for any particular "purpose. . . . The revenue from precepts was £66,170. That "was the revenue of the board of which they had the right to "dispose as they wished. It ought to be taken without any "deduction for interest charges."

Counsel sought to distinguish the *Aberdeen* case[16] from the present case on the ground that in the former case the revenue in question arose from ordinary charges to consumers for electricity sold to them, whereas in the present case the £3,365 was part of a sum raised by precept. To my mind, my Lords, this is a distinction without a difference for the present purpose. Moreover, the abstract of accounts shows no earmarking of the sum of £9,515 mentioned in the estimates, or any other sum, for the purpose of financing the loan charges on works not yet in beneficial occupation, and it is impossible for anyone to say from a perusal of the abstract whether the sum of £3,365 was paid out of the moneys received from precepts, or out of moneys received from water charges, or out of the "excess of precept

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[13] 1927 S.C. 458.

[14] [1920] A.C. 273, 305; 36 T.L.R. 233.

[15] [1956] 2 Q.B. 55, 67; [1956] 2 All E.R. 59.

[16] 1927 S.C. 458.

"income" carried forward from the previous year, of which (as appears from the facts already stated) at least £16,542 was spent in the year ended March 31, 1952.

As to the two cases already mentioned, which were relied upon by counsel for the board in the Court of Appeal, I agree with that court in thinking that the *Marylebone* case[17] cannot stand with the reasoning of this House in the *St. James'* case,[18] and Mr. Rowe does not seek to rely upon it. He does, however, rely upon the *Manchester* case.[19] He seeks to distinguish it from the *Marylebone* case[20] on the ground that in the former case, as in the present case, the sum sought to be deducted from the gross receipts was expended to meet interest on loans in respect of works not yet completed, and he submits that the decision in the *Manchester* case[21] was correct, though the reasoning was wrong in so far as the court relied upon the *Marylebone* case.[22]

Here, again, my Lords, I would borrow, with gratitude, the language of the Court of Appeal. The passage was directed to the entire sum of £9,515 which was then sought to be deducted from the gross receipts, but it applies equally to the £3,365 now under consideration[23]:

"It is said that a hypothetical tenant would not pay any rent "for works which were not completed, so nothing should be "included on that account. The answer is, however, that we are "not inquiring what rent he would pay for the yet uncompleted "works, but the rent for the already completed works. The "hypothetical landlord of a growing undertaking would reasonably expect to receive enough rent from the existing works to "enable him to keep pace with his growing expenditure. The "hypothetical tenant is not concerned with what the hypothetical "landlord does with his money once he gets it. The hypothetical "landlord can lay it out on maintaining the old works or making "new ones. The whole question is, what is the landlord's rent? "What he does with it is his concern, not the tenant's.

"The point is also put in a slightly different way. It is said "that what is being rated is the existing water system, not the "uncompleted works which are incapable of beneficial occupa- "tion. This, however, carries the matter no further, since the

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[17] [1923] 1 K.B. 86.
[18] [1934] A.C. 33.
[19] 144 L.T. 570.
[20] [1923] 1 K.B. 86.
[21] 144 L.T. 570.
[22] [1923] 1 K.B. 86.
[23] [1956] 2 Q.B. 57, 69–70.

"question is always what revenue can be obtained by the hypothetical tenant from his occupation of the hereditaments to be rated, and all the receipts from the precepts form part of such revenue. The Court of Session had this very point before them in *Aberdeen Magistrates* v. *Aberdeen Assessor*.[24] The Aberdeen Corporation had spent £7,390 on interest and sinking fund on incomplete and unproductive works. They argued that this should be deducted from their total revenue; but the court held that the deduction was inadmissible. We agree with that decision and think we should follow it."

I now come to Mr. Rowe's final point, already stated. He seeks to support it by reference to two Scottish cases. The first is *Fife Assessor* v. *Dunfermline District Committee of Fife County Council*.[25] The facts were that waterworks belonging to the district committee included a reservoir constructed during the war of 1914–1918 at an exceptionally high cost. The cost had been affected by the general conditions affecting prices and labour during that period and also by the fact that the Admiralty had insisted that the work should be completed as rapidly as possible. The district committee admitted that the principle known as the "profits system" in England and as the "revenue principle" in Scotland was applicable to the valuation of their undertaking; but argued that, owing to the exceptional circumstances already stated, the principle, if strictly applied, would lead to an unreasonable result, and that there ought to be some modification. The Lands Valuation Appeal Court accepted this argument, and made a deduction of 20 per cent. from the valuation ascertained according to the revenue principle, on account of the wholly exceptional circumstances in which the reservoir had been constructed.

The second case referred to by Mr. Rowe is *Stirlingshire Assessor* v. *Stirlingshire and Falkirk Water Board*.[26] In that case the water board had carried out extensions of their works under an arrangement with the Unemployment Grants Committee, by which they received from the committee—subject to a number of conditions in favour of unemployed persons—an annual payment for a period of 15 years of 65 per cent. of the interest and sinking fund charges on the loan raised to meet the expenditure. The extensions, which at the time were not required by the board, were undertaken only in deference to the wishes of the committee. It was held by the Lands Valuation Appeal

[24] 1927 S.C. 458.

[25] 1929 S.C. 304.

[26] 1931 S.C. 369.

Court that although the undertaking should be valued on the revenue principle, the annual payment just mentioned was of such an exceptional character that it did not fall to be included in the annual revenue of the board.

My Lords, it may be that the Lands Valuation Appeal Court was justified in dealing with these two cases in an exceptional manner, as a most unusual position had arisen owing to the intervention in one case of the Admiralty, and in the other of a governmental committee. It is, however, unnecessary to consider them further, for I can see no ground for treating the present case as an exceptional one. There is nothing in the case stated to suggest that the circumstances were in any way exceptional or, indeed, unusual; on the contrary, the facts would seem to negative any such suggestion.

I would dismiss the appeal.

My Lords, my noble and learned friend, Lord Evershed, who is unable to be present today, has intimated to me that he agrees with the opinion which I have just delivered.

LORD RADCLIFFE. My Lords, I have some sympathy with the general line of criticism which has led to this appeal by the Mid-Northamptonshire Water Board. There is no doubt something absurd in the simple proposition that the net annual value of the rateable hereditaments occupied by a water undertaker increases in one year as against the previous year merely by virtue of the fact that in the second year the undertaker has to raise and pay loan charges in respect of uncompleted works which are not yet contributing to the receipts of the undertaking and of which the undertaker is not yet in rateable occupation. Yet this is just what does result from using the profits basis as the method of assessment, unless there is some modification of the formula involved to which we ought to give recognition, despite the fact that no such modification has commended itself to the Court of Appeal. In their view, the profits basis, rightly understood, does not admit of any deduction being made from the gross receipts accruing to the undertaking from water rates, water charges or water precepts, although it is shown that part of the money raised was raised for or spent on loan charges in respect of the cost of uncompleted works.

I think that the view of the Court of Appeal must be upheld. It does not seem to me that the anomaly which a comparison of the net annual value of one year with that of another exhibits in this case is of any determining importance, once it is accepted that the rent attributed to a hypothetical tenant, and therefore the net annual value, depends in any year upon the gross receipts obtained by the undertaker through the exercise of the statutory powers attached to the undertaking. The first element in the computation, the gross receipts, is arrived at, not by asking what maximum sum the undertaker could have got from the operation of his undertaking, nor yet by asking what sum he should have got if economic theory rather than statutory powers had been the basis of his receipts—an inquiry which is almost meaningless in the circumstances postulated—but by ascertaining what in fact he did get during the accounting year preceding the year of assessment. Computations made in this way must show up anomalies from year to year because the circumstances which bring about a change in the gross receipts have no necessary connexion with any change in the rateable hereditaments themselves. Possibly the likelihood of anomalies is increased when, as here, a considerable part of the gross receipts is obtained by precepts addressed to constituent local authorities which are themselves the product of estimates of revenue and expenditure made before the financial year is itself begun and which take account of credit or debit balances on revenue account carried forward from the preceding year.

To take an instance from this case. The practical force of the appellants' argument is in the comment that the gross receipts of the undertaker would never have been as large as they were if £9,515 of them had not been called for by precept in order to provide money for meeting the loan charges for the uncompleted works. This results, it is said, in basing the net annual value of the existing works in part on the cost of the non-existent works. In one sense this may be true; but at the same time there is a fallacy involved in treating it as the whole truth. The estimates as a whole were, no doubt, the cause of the block sum actually precepted for: yet the amount of that sum was as much conditioned by the fact that the year began with a carry-forward of £30,193 as by the expected requirements of loan finance for the year. Neither the carry-forward at the beginning of the year nor the carry-forward at the end of the year (£13,650) contributes to the computation of gross receipts obtained in the year. There is no more reason for saying that any part of the sums raised by precept in the year was raised for meeting loan charges on new works than there is for saying that these charges were met out of sums carried forward from the preceding year. Since the latter do not come into computation anyway, there would be no hardship in treating the full sum raised by precept in the year as computable revenue for the year. The fact as I see it is that no items of receipt can be allocated to items of expenditure in this way. It is not right to isolate one item of the composite estimates and try to reduce the computation of gross receipts by that amount, if only because the estimates were the cause but not the condition of the resulting precepts and the water board were quite free to retain, expend or carry forward the sums raised when, as it turned out, the expenditure required for the year's loan charges on new works was very much less than had been budgeted for. The receipts were general receipts. It is not right, on the other hand, to isolate one item of the actual expenditure and then try to reduce the computation of gross receipts by that amount (this is the form of the appeal as argued before us), because, if one is to use the profits basis at all, the question what is the quantum of gross receipts to attribute to the undertaker as tenant or the tenant as undertaker is not affected by the independent question what use the undertaker in his undifferentiated capacity would have to make of all or some part of those receipts (see the decision of the House in *St. James' and Pall Mall Electric Light Co. Ltd.* v. *Westminster Assessment Committee*[27]). The true question is, what comes to the tenant's pocket in exercise of the undertaking.

Regarded in this way, the present case is, I think, rather an illustration of how the profits basis of assessments operates in certain special circumstances than a convincing criticism of the general formula by which the basis is defined. In particular, I do not think that it is correct to say that, if the gross receipts are allowed to include the sum used for loan charges on the uncompleted works, the effect is to rate indirectly hereditaments which are not capable of being rated directly.

If one turns to decided cases, the general principle is to be found in the *Kingston Union* decision[28] of this House. You must look to "the profits earned by the whole undertaking . . . the "gross receipts of the undertakers." It would be wrong to attribute any magical force to the use of the word "undertaking" in this context. The special point that is now before us was not then before the House. "Undertaking" was used to denote the totality of the rateable hereditaments presently occupied by the undertakers. So far I agree with the appellants. But, then, receipts do not arise from the mere occupation of physical assets. If the occupier is a statutory occupier, they arise from the exercise of the statutory powers and subject to the statutory conditions which are attendant upon the conduct of the undertaking upon and through those assets. As Lord Buckmaster said in *Port of London Authority* v. *Orsett Union Assessment Committee*[29]: "The actual hereditament of which the "hypothetical tenant is to be determined must be the particular "hereditament as it stands, with all its privileges, opportunities "and disabilities created or imposed either by its natural position "or by the artificial conditions of an Act of Parliament."

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[27] [1934] A.C. 33.

[28] [1926] A.C. 331.

Now, if I take the rateable hereditaments of the appellants as they stood in the relevant year, I find that they could be put to use under the shelter of statutory powers which involved in part the charging of non-domestic consumers for water directly supplied, and in part the raising of the balance needed on revenue account by precepts directed to the constituent local authorities on behalf of their ratepayers as a whole. The one as much as the other seems to me a way of obtaining receipts in return for the service of providing a supply of water. The one power as much as the other seems to me a power incidental to the undertaking which would pass to and be exercisable by the hypothetical tenant as occupier of the undertaking for the year of assessment. That, as I understand it, is the effect of the decision of the Court of Appeal in *Dewsbury and Heckmondwike Waterworks Board* v. *Penistone Union Assessment Committee*.[30] I should have come to the same conclusion apart from that case.

Does it really matter, then, that some of the moneys covered by the precept were raised for, or expended on, the loan charges for works not yet part of the rateable hereditament? I do not think so. Given different circumstances you might easily find an undertaker whose tariff for water supplied to individual consumers was calculated on the basis of covering loan charges for new but uncompleted works and who did in fact include the service of such charges among his current expenditure for the year. Just as much as in the present case, the result would be that the net annual value of the rateable hereditaments was enlarged by the sums required for the construction of hereditaments not themselves rateable. The anomaly is as great in that case as in this. On more than one occasion the Scottish courts have had to consider just that situation, the rating assessment of the statutory undertaker whose charges and, therefore, whose receipts covered provision for loan charges or a sinking fund in respect of uncompleted works. Uniformly, so far as appears, they have held that this circumstance does not require a pro tanto reduction of the computable receipts. See *Edinburgh Parish Council* v. *Assessor of Railways and Canals*,[31] *Aberdeen Magistrates* v. *Aberdeen Assessor*.[32] In my opinion, those decisions were correct in principle.

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[29] [1920] A.C. 273, 305.

[30] (1886) 17 Q.B.D. 384.

Nor was their correctness challenged by the argument put forward on this appeal. What was said was that a critical distinction ought to be made for this purpose between receipts which, as in the *Aberdeen* case,[32] arose from charges directly made to consumers for electricity or water supplied through the medium of the existing rateable assets and receipts which, as here, arose from precepts which were no more than a means of covering the deficit on revenue account caused by the fact that the existing rateable hereditaments did not produce an adequate balance to meet the permissible charges on that account. Precepted receipts, on this view, were not to be regarded as necessarily receipts of the hypothetical tenant: so far as they were used for purposes extraneous to the service of the existing rateable hereditaments, they were "landlord's revenue" and as such to be excluded from computation.

My Lords, I regard this distinction as unfounded. I will offer two reasons for my opinion. One is that receipts obtained by precept are not essentially different from receipts obtained by the making of direct charges to individual consumers. Each class of receipt arises from the exercise of a power incident to the undertaking to obtain money on revenue account as a return for the authorized operations of the year. The other reason is that neither the precepting power nor the precepted receipts are capable of being divided between landlord and tenant in the way suggested. The moneys raised by precept (£66,170) were no more particularly applicable to the loan charges on uncompleted works than the moneys raised by charges to domestic or metered consumers or the surplus brought forward from the preceding year (£30,193), and, even if they had been, it is, I think, fundamental that the sum of gross receipts in the hands of the undertaker as tenant is not to be treated as reduced by any consideration of the use to be made of those receipts by the undertaker either as landlord or in his undifferentiated capacity.

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[31] (1925) Poor Law and Local Government Magazine, June, 1925. Reports of Cases, p. 140.

[32] 1927 S.C. 458.

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MID-NORTHAMPTONSHIRE WATER BOARD v. LEE (VALUATION OFFICER).

Lord Radcliffe.

It is this last point which is settled by the decision of this House in the *St. James'* case.[33] But, if so, the judgment in *Metropolitan Water Board* v. *St. Marylebone Assessment Committee* [34] cannot any longer be regarded as good law, because it depended essentially on the view that the part of an undertaker's receipts which consisted of precepted revenue ought not to enter the computation of gross receipts if that revenue was raised in order to meet a deficiency on revenue account to which loan charges on borrowed capital contributed at any rate no less an amount. So to decide is to measure gross receipts by the purposes to which they are to be put. And, if the *St. Marylebone* case [34] decision can no longer be supported, no more can the decision in *Manchester Corporation* v. *Bolton Area Assessment Committee and Little Hulton Urban District Council*,[35] the effect of which was to exclude from the computation of gross receipts the whole sum raised by a public water rate, because the deficiency which that rate was to balance was contributed to by an even larger charge on the year for the debt service on uncompleted works. The ratio decidendi of this last case was that of the *St. Marylebone* case.[36] It stands or falls with it. Despite the eminent authority and experience of the court which decided the *Manchester* case,[37] and the sympathetic plausibility of their view, I do not think that in the light of the later decisions it is open to us to support it.

I agree that the appeal must be dismissed.

LORD COHEN. My Lords, I agree with the speech which has been delivered by my noble and learned friend on the Woolsack and have nothing to add.

LORD KEITH OF AVONHOLM. My Lords, the subject of valuation in this case is a water undertaking and it is common ground that such an undertaking falls to be valued on the profits basis. The application of this basis not infrequently produces somewhat anomalous results, but no better system has been devised for valuing revenue-producing public utility concerns, which bear the stamp of monopolies or quasi-monopolies, and to such concerns the profits basis has been applied for valuation purposes for about a hundred years. It appeared to me that at certain points the appellants' counsel sought to escape from the rigour of the application of this principle by seeking to equate waterworks under construction with a house, or a factory, under construction. But the latter fall to be treated for valuation purposes as units in themselves, whereas works under construction in a water undertaking are part of the undertaking and are not, in my opinion, capable of being considered in isolation, as something in the occupation of the hypothetical landlord. It may be that no value is generally attributable to such works specifically, during the construction period, a view on the rightness of which I express no opinion, but they cannot, in my opinion, be notionally severed from the undertaking as a whole in order to reduce the cumulo value based upon the occupation of the hypothetical tenant. In this respect they differ from such hereditaments as farms and fishings which may have been acquired, as in the present case, by a water board under their statutory powers. These have nothing to do with the supply of water and are rightly treated separately for the purposes of valuation, whether let or not by the statutory authority.

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[33] [1934] A.C. 33.
[34] [1923] 1 K.B. 86.
[35] 144 L.T. 570.
[36] [1923] 1 K.B. 86.
[37] 144 L.T. 570.

It follows as a corollary that the revenue received from the carrying on of the water undertaking must be ascribed to the occupation of the hypothetical tenant, even if part of this revenue is raised to service loan charges in respect of works under construction. It was conceded by counsel for the appellants that this was so where the revenue was raised by means of charges upon the consumers, but he drew a distinction in the case where the loan charges for uncompleted works were met out of public rates, or by precepts, as in the present case, upon rating authorities. In so contending he maintained the soundness of the decision in *Manchester Corporation* v. *Bolton Area Assessment Committee and Little Hulton Urban District Council*,[37] and distinguished the case of *Aberdeen Magistrates* v. *Aberdeen Assessor*.[38] In my opinion, it is impossible to draw any such distinction. Public water rates and water charges on consumers are sources of revenue, on either or both of which statutory water undertakers draw for the purpose of carrying on their undertaking. When the undertakers, as assumed hypothetical tenants, enter into occupation of the hereditaments these are the sources from which they will draw their receipts, a proportion of which they will be deemed to pay to the hypothetical landlord as rent. If a proportion of the gross receipts were to be regarded as directly derived by, or collected for, the hypothetical landlord in respect of the works under construction, I should have thought that these works would then be rated as a separate hereditament

[37] 144 L.T. 570.

[38] 1927 S.C. 458.

at a corresponding annual value. This would bring no advantage to the water undertakers, though it would benefit the rating authority within whose area the projected works lay. But the true view, I think, is that the total revenue collected, whether by way of rates or by way of water charges, is to be treated as referable to the rateable hereditaments occupied by the undertakers. How the cumulo annual value thus arrived at is to be allocated among the various rating areas is a matter with which your Lordships in this case are not concerned. The true application of the profits basis of valuation requires the whole proceeds raised in respect of the carrying on of a water undertaking to be regarded as receipts of the undertakers as hypothetical tenants and the proportion thereof calculated to belong to the hypothetical landlord to be treated as rent out of which the landlord must pay the loan charges in respect both of completed and uncompleted works.

This, in my opinion, is the necessary result of working out the principles laid down by this House in *St. James' and Pall Mall Electric Light Co. Ltd.* v. *Westminster Assessment Committee.*[39] Authorities more closely in point are the decisions of the Lands Valuation Appeal Court in Scotland in *Aberdeen Magistrates* v. *Aberdeen Assessor*[40] and *Edinburgh Parish Council* v. *Assessor of Railways and Canals.*[41] If these latter decisions are applicable, they are destructive of the argument for the appellants. Their counsel, I understand, accepted these decisions as sound decisions but sought to distinguish them on the ground that the sums there applied to loan charges on uncompleted works were raised out of water charges levied on the consumers. The distinction, for the reasons I have already given, is, in my opinion, inept. It will also, I think, be found that the case of the *Edinburgh Parish Council*[41] was one where the loan charges for the uncompleted works were met, at least in part, out of public water rates. In my opinion, these cases were rightly decided and the case of the *Manchester Corporation* v. *Bolton Area Assessment Committee and Little Hulton Urban District Council*[42] was wrongly decided.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Sherwood & Co. for C. E. V. Rowe, Northampton; Solicitor of Inland Revenue.*

F. C.

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[39] [1934] A.C. 33.

[40] 1927 S.C. 458.

[41] Poor Law and Local Government Magazine, June, 1925, Reports of Cases, p. 140.

[42] 144 L.T. 570.

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Nov. 6.

NANA OFORI ATTA II. OMANHENE OF AKYEM ABUAKWA AND ANOTHER . . APPELLANTS;

AND

NANA ABU BONSRA II AS ADANSEHENE AND AS REPRESENTING THE STOOL OF ADANSE AND ANOTHER . . . . RESPONDENTS.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

Estoppel—Conduct, by—Standing by judicial proceedings—Rival claims to stool lands—Previous suits between parties' subordinates in same interest — Knowingly standing by — Estopped by conduct from litigating same issue—West Africa (Gold Coast).
West Africa (Gold Coast).

On a claim by the appellant stool against the neighbouring respondent stool to certain lands in Ghana the respondent alleged that in proceedings 16 years previously a subordinate stool of the appellant had failed to establish title to the lands now in dispute as against a subordinate stool of the respondent, and that the appellant, having knowingly stood by while the title was fought out by its subordinate in the same interest in the earlier suit—in which the appellant and respondent were not parties—was estopped by conduct from litigating the question of title again against the respondent:—

Held, that the principle stated by Lord Penzance in *Wytcherley* v. *Andrews* (1871) L.R. 2 P. & M. 327 at p. 328 that "if a person, "knowing what was passing, was content to stand by and see his "battle fought by somebody else in the same interest, he should be "bound by the result, and not be allowed to reopen the case," was not limited to wills and representative actions, and while it might have been found appropriate in England only in special conditions, there was no reason why in West Africa it should not be applied to conditions which were found appropriate for it there. The principle was, in the absence of technical legal reasons to the contrary, applicable in the present case, and accordingly the appellant stool, having knowingly stood by while its subordinate fought the question of title in the same interest, was estopped from litigating the matter afresh.

Akwei v. *Cofie* (1952) 14 W.A.C.A. 143 considered.

Judgment of the West African Court of Appeal (1952) 14 W.A.C.A. 149 affirmed.

APPEAL (No. 43 of 1953) from a judgment of the West African Court of Appeal (Gold Coast Session) (July 9, 1952) affirming a judgment of the Supreme Court of the Gold Coast (November 12, 1949) dismissing a claim by the appellants for a declaration of title to land and an injunction.

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* *Present*: LORD TUCKER, LORD DENNING and the RT. HON. L. M. D. DE SILVA.

The following facts are taken from the judgment of the Judicial Committee: This case was a dispute about the title to certain lands in Ghana called the Nsuakwate or Anungya lands (hereinafter called "the lands in dispute"). The principal parties who appeared before the Board to claim title to them were, on the one hand, the plaintiff, the Stool of Akyem Abuakwa, which was represented by the Omanhene or head chief Nana Ofori Atta II (hereinafter called "Akim Abuakwa"), and, on the other hand, the defendant, the Stool of Adanse, which was represented by the Adansehene or head chief Nana Abu Bonsra II (hereinafter called "Adansi").

The plaintiff Akim Abuakwa was a paramount stool and said that the lands in dispute were under its paramountcy and in particular that they were part of the Muronam lands which were subject to it. The Odikro or sub-chief of Muronam was joined as a co-plaintiff with Akim Abuakwa. (He is hereinafter called "Muronam.")

The defendant Adansi was a neighbouring stool which claimed that the lands in dispute formed part of the Adansi stool but were under the immediate custody of the Stool of Banka, which was represented by the Ohene or Chief Brako Ababio II (hereinafter called "Banka"). Adansi said that Banka was caretaker of the lands in dispute for Adansi. In the Courts of West Africa Banka applied to be joined as co-defendants with Adansi and were joined accordingly, but they were not represented before the Board.

The question in this appeal was whether it was open to Akim Abuakwa and Muronam to litigate in this action the title to the lands in dispute. Adansi said that the title to the lands in dispute was fought out 16 years ago in proceedings between Muronam and Banka. In that earlier case Muronam failed to establish its title to the lands in dispute. The question was whether that finding precluded the paramount stool of Akim Abuakwa from now claiming title against Adansi. Adansi said that Akim Abuakwa was so precluded on one or other of two grounds: (1) estoppel by res judicata on the ground that Muronam was a party to the previous proceedings and Akim Abuakwa was a privy to them; or, alternatively, (2) estoppel by conduct on the ground that the Akim Abuakwa knowingly stood by whilst the title was fought out by their subordinate in the previous proceedings

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and it would be inequitable to allow them to bring up the question again. Jackson J. upheld the contention of Adansi on the second ground. The West African Court of Appeal (Foster Sutton P., Coussey J.A. and Manyo-Plange J.) upheld the contention of Adansi on both grounds. The result was that the claim of Akim Abuakwa and Muronam had been dismissed. They appealed to Her Majesty in Council.

1957. July 2, 3, 4, 10. *Phineas Quass Q.C.* and *Gilbert Dold* for the appellants. The appellants were not estopped—either by res judicata or by conduct—by the earlier proceedings in 1940 between Muronam and Banka from pursuing the present suit for a declaration of title to the lands in dispute and for consequential relief. If the first appellant had been bound to intervene in the earlier proceedings to protect his interest, then he might have been estopped from litigating the present suit, but there was no reason for him to intervene except later on the basis that his rights had been affected as a result of the decision. The Adansehene was not a party to the 1940 litigation, and in that suit the Odikro of Muronam did not claim under the first appellant. The 1940 litigation did not decide the ownership of the lands in dispute; further, the interest claimed by Muronam in that suit was not identical with that claimed by the appellants in the present action. *Kobina Angu* v. *Cudjoe Attah* [1] shows that " the " former evidence could be looked at in order to explain what " was really the subject-matter of the former dispute." Neither the first appellant nor the respondent was a " privy " to any of the parties in the 1940 litigation and there is no estoppel by res judicata on that ground. On estoppel by res judicata, see Halsbury's Laws of England, 3rd ed., vol. 15, p. 196, para. 372; *Doe* d. *Smith and Payne* v. *Webber* [2]; *Lazarus-Barlow* v. *Regent Estates Co. Ltd.* [3]

As to estoppel by conduct—the allegation that the first appellant knowingly stood by while its subordinate Muronam fought the issue of title in the same interest—estoppel by conduct regarding land was not recognized in the Gold Coast until 1952: *Akwei* v. *Cofie.* [4] English authorities on this aspect of the matter are *Gray* v. *Lewis*, *Parker* v. *Lewis*, [5] *Borough* v. *Whichcote* [6]

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[1] Judgments of the Judicial Committee on appeal from the Gold Coast, 1874–1928, 43, 48.

[2] (1834) 1 Ad. & E. 119.

[3] [1949] 2 K.B. 465, 496; 65 T.L.R. 412; [1949] 2 All E.R. 118.

[4] (1952) 14 W.A.C.A. 143.

[5] (1873) L.R. 8 Ch. 1035, 1059.

[6] (1732) 3 Bro.P.C. 595.

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and *Mercantile Investment and General Trust Co.* v. *River Plate Trust, Loan and Agency Co.*[7] Of the African cases, *Yode Kwao* v. *Kwasi Coker*,[8] which was relied on by the respondent in the court below, does not justify the conclusion that the first appellant was estopped. *Appoh Ababio* v. *Doku Kanga*,[9] if it is right, completely supports the appellants' case here. Manyo-Plange J., in his judgment in the court below, said [10]: "I think the case of "*In re Lart, Wilkinson* v. *Blades* [11] supports the view that the "first plaintiff-appellant is estopped by his conduct. I see prac-"tically no distinction between that case and the present except "that, in *Wilkinson* v. *Blades*, Wilkinson actually took a benefit "under the judgment; but that in my view only amounted to "further evidence of acquiescence." It is submitted that the judge was in error when he said that the only distinction was that Wilkinson actually took a benefit under the judgment. That case related to the interpretation of a will, and the facts differ widely from those in the present case. The first appellant was not estopped by conduct by not intervening in the 1940 litigation.

Ralph Millner for the respondent. There are two questions: first, res judicata, i.e., estoppel by reason of the decision in the previous suit of 1940; second, estoppel by conduct—the standing by point. Res judicata is a purely English doctrine, but here it has to be applied to facts and circumstances very different from those in relation to which it has been developed in England. There being no pleadings in the suit of 1940, to ascertain what was then decided one is entitled to look at the whole record, including the evidence (*Kobina Angu's* case [12]), and there was plainly a head-on clash, each side claiming to own the land as against the other. [Reference was made to *In re May*,[13] *Marginson* v. *Blackburn Borough Council* [14] and Halsbury's Laws of England, 3rd ed., vol. 15, p. 184, para. 357.] The evidence should be looked at for the purpose of deciding who were privies. There was nothing to indicate any difference between the title of Muronam and of the appellant stool. "Privies" are persons claiming "through" parties: *Spencer* v. *Williams* [15]—the word "under" in *Gray* v. *Lewis* [16] is not necessarily quite accurate.

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[7] [1894] 1 Ch. 578; 10 T.L.R. 184.

(1931) 1 W.A.C.A. 162.

[9] (1932) 1 W.A.C.A. 253.

[10] (1952) 14 W.A.C.A. 149, 152.

[11] [1896] 2 Ch. 788.

[12] Judgments of the Judicial Committee on appeal from the Gold Coast, 1874–1928, 43, 48.

[13] (1885) 28 Ch.D. 516; 1 T.L.R. 220.

[14] [1939] 2 K.B. 426; 55 T.L.R. 389; [1939] 1 All E.R. 273.

[15] (1871) L.R. 2 P. & M. 230.

[16] L.R. 8 Ch. 1035.

[Coke on Littleton, p. 352a, was referred to.] None of the English cases resemble the present case on the facts. In accordance with the English authorities the first appellant was a privy of Muronam in the 1940 proceedings, and the first respondent was a privy of Banka, and the issue of title is therefore res judicata as between the appellants and the respondent here.

The standing by point has a certain affinity to res judicata. The clear principle emerges from the English authorities, which has been applied in the African setting, that if a person whose interest may be affected by litigation, and who has an opportunity to intervene, nevertheless stands by and allows the litigation to proceed and the issue to be fought by another in the same interest, he cannot thereafter be allowed himself to litigate the same matter. In support of that proposition are *In re Lart, Wilkinson* v. *Blades*,[17] *Wytcherley* v. *Andrews*,[18] *Farquharson* v. *Seton*[19] and *Roden* v. *London Small Arms Co. Ltd.*[20] The following cases show how the courts in West Africa have dealt with this matter: *Yode Kwao* v. *Kwasi Coker*,[21] in which standing by was treated as an estoppel; *Appoh Ababio* v. *Doku Kanga*[22]; *Odua Esiaka* v. *Vincent Obiasogwu*[23]; *Nana Kwami Nkyi XI* v. *Sir Isibu Darku IX*[24]; the last cited case is close to the present case. The first appellant is estopped by conduct from litigating the same issue of title.. [Reference was also made to *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.*[25]; *Magrath* v. *Reichel*[26]; *Amodu Tijani* v. *Secretary, Southern Nigeria*,[27] and *Ohene Sintim* v. *C. M. Apeatu.*[28]]

Quass Q.C. in reply. The principle stated in *Wytcherley's* case[29] with regard to the effect of standing by should be confined to wills and representative actions. [*Ruttmern* v. *Ruttmern*,[30] *Yode Kwao's* case[31] and *Appoh Ababio* v. *Doku Kanga*[32] were also referred to.]

Nov. 6. The judgment of their Lordships was delivered by LORD DENNING, who stated the facts set out above and continued:

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[17] [1896] 2 Ch. 788.
[18] L.R. 2 P. & M. 327.
[19] (1828) 5 Russ. 45.
[20] (1876) 46 L.J.Q.B. 213.
[21] 1 W.A.C.A. 162.
[22] 1 W.A.C.A. 253.
[23] (1952) 14 W.A.C.A. 178.
[24] (1954) 14 W.A.C.A. 438.
[25] [1955] 1 W.L.R. 761; [1955] 2 All E.R. 657.
[26] (1887) 57 L.T. 850; 4 T.L.R. 296; (1889) 14 App.Cas. 665; 5 T.L.R. 552.
[27] [1921] 2 A.C. 399, 402.
[28] (1936) 2 W.A.C.A. 201.
[29] L.R. 2 P. & M. 327.
[30] (1937) 3 W.A.C.A. 178.
[31] 1 W.A.C.A. 162.
[32] 1 W.A.C.A. 253.

Everything depends on what took place in the previous proceedings which were heard in the Chief Commissioner's Court of Ashanti in the year 1940. Their Lordships have found some difficulty in ascertaining the issues in those proceedings because there were no pleadings. The Rules of Court say that suits shall ordinarily be heard and determined in a summary way without pleadings: and this suit was so heard and determined. But it is permissible to look at the opening statements by counsel and at the evidence as well as the judgment. In the case of *Kobina Angu* v. *Cudjoe Attah* in 1916 [1] Sir Arthur Channell, delivering the judgment of the Board, said that " the former evidence could " be looked at in order to explain what was really the subject-" matter of the former dispute."

Looking at these materials, it becomes clear that on May 6, 1940, Muronam sued Banka in the Chief Commissioner's Court claiming a declaration of title to the self-same lands as are now in dispute, £100 damages for trespass, and an injunction to restrain Banka from entering the lands. In the course of the evidence both sides claimed to be the first settlers and both claimed to have exercised acts of ownership over the lands in dispute. A good deal was said about a decision of Captain Soden in 1907, when he, at talks with some of the chiefs, laid down the boundaries of the Banka lands. That was an executive decision only, not a judicial decision; but, after it was given, Banka acknowledged that the lands in dispute belonged to Adansi and said that Banka was caretaker of them for Adansi.

On November 19, 1940, the court gave its decision. The Acting Assistant Chief Commissioner dismissed Muronam's claim to the land, but he relied much on the executive decision of Captain Soden. He said: " I find there is no evidence on the " plaintiff's side to justify the grant of the declaration of title " which he seeks, but, on the other hand, that the question of the " ownership of the land has already been decided by validated " executive decision. There will therefore be judgment for the " defendants."

Muronam appealed from that decision to the West African Court of Appeal, who, on May 29, 1941, dismissed the appeal. They saw no reason to differ from the decision in the court below that " there is no evidence on the plaintiff's side to justify the " grant of the title which he seeks." But they thought it necessary to add that they did not subscribe to the other finding that the matter had been decided by the executive decision. Muronam failed, therefore, on the ground that it had not made out its title to the lands in dispute.

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[1] Judgments of the Judicial Committee on appeal from the Gold Coast, 1874–1928, 43, 48.

Akim Abuakwa and Adansi were not parties to those proceedings, but they undoubtedly knew of them and of the disputes that had been going on for years before. There is ample material to show that whenever Muronam or Banka complained of a trespass, each reported it to his superior, Akim Abuakwa or Adansi, as the case might be, who then took the matter up on behalf of his subordinate. Thus, the secretary to Akim Abuakwa gave evidence on behalf of Muronam and put in a series of letters in 1935 which showed that the Adansi had purported to grant a concession over the land to a mining company, that white men had gone onto the land, whereupon Muronam reported to Akim Abuakwa, who took up the matter with the mining company saying that "all questions affecting Muronam land have got to " be settled by him " and that the " Adansi has no right over this " land." On the other hand, the linguist representing the Adansi gave evidence on behalf of Banka. He said that Banka was caretaker for Adansi and added that " if anyone trespass on the " land the Banka is to report to Adansehene who, if he chooses, " will take action."

Under the Rules of Court it would have been open to Akim Abuakwa or Adansi to apply to be joined as parties in those earlier proceedings, but neither of them did so.

Such being the facts, there is, as between Muronam and Banka, a clear estoppel by res judicata because they were *parties*; but their Lordships have to say whether there is an estoppel between Akim Abuakwa and Adansi, who were not parties.

The general rule of law undoubtedly is that no person is to be adversely affected by a judgment in an action to which he was not a party, because of the injustice of deciding an issue against him in his absence. But this general rule admits of two exceptions: one is that a person who is in privity with the parties, a " privy " as he is called, is bound equally with the parties, in which case he is estopped by res judicata: the other is that a person may have so acted as to preclude himself from challenging the judgment, in which case he is estopped by his conduct. Their Lordships propose in this case to consider first estoppel by conduct.

English law recognizes that the conduct of a person may be such that he is estopped from litigating the issue all over again. This conduct sometimes consists of active participation in the previous proceedings, as, for instance, when a tenant is sued for trespassing on his neighbour's land and he defends it on the strength of the landlord's title and does so by the direction and authority of the landlord. If the tenant loses the action, the landlord would not be allowed to litigate the title all over again by bringing an action in his own name. On other occasions the conduct consists of taking an actual benefit from the judgment in the previous proceedings, such as happened in *In re Lart, Wilkinson* v. *Blades.*[2] Those instances do not however cover this case, which is not one of active participation in the previous proceedings or actual benefit from them, but of standing by and watching them fought out or at most giving evidence in support of one side or the other. In order to determine this question the West African Court of Appeal quoted from a principle stated by Lord Penzance in *Wytcherley* v. *Andrews.*[3] The full passage is in these words: "There is a practice in this court, by which any "person having an interest may make himself a party to the "suit by intervening; and it was because of the existence of "that practice that the judges of the Prerogative Court held, that "if a person, knowing what was passing, was content to stand "by and see his battle fought by somebody else in the same "interest, he should be bound by the result, and not be allowed "to re-open the case. That principle is founded on justice and "common sense, and is acted upon in courts of equity, where, "if the persons interested are too numerous to be all made parties "to the suit, one or two of the class are allowed to represent "them; and if it appears to the court that everything has been "done bona fide in the interests of the parties seeking to disturb "the arrangement, it will not allow the matter to be re-opened."

Mr. Phineas Quass argued before their Lordships that the principle stated by Lord Penzance was confined to wills and representative actions and has never been extended further. No decision, however, was cited to their Lordships which confines the principle to wills and representative actions. Their attention was indeed drawn to one case where a like principle was applied to mortgages in somewhat special circumstances: see *Farquharson* v. *Seton.*[4] But assuming, without deciding, that the English decisions have hitherto been so confined, their Lordships would point out that there is nothing in the principle itself which compels it to be limited to wills and representative actions. The principle, as Lord Penzance said, is founded on justice and common sense. It may have been found appropriate in England only in special conditions. But there is no reason why in West Africa it should not be applied to conditions which are found appropriate for it there, but which have no parallel in England. It seems to be the recognized thing in this part of West Africa for all persons with the same interest in a land dispute to range themselves on one side or the other. Sometimes they apply to be joined as parties. On other occasions they regard the named party as their champion and support him by giving evidence. If he wins, they reap the fruits of victory. If he fails, they fall with him and must take the consequences. It is now 25 years ago that the Chief Justice drew attention to this way of looking at litigation: see *Yode Kwao* v. *Kwasi Coker*,[5] *Appoh Ababio* v. *Doku Kanga*.[6] It has led the Court of Appeal in West Africa to look for a principle to meet the situation and they have found it in the principle stated by Lord Penzance: see *Akwei* v. *Cofie*.[7]

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[2] [1896] 2 Ch. 788.

[3] (1871) L.R. 2 P. & M. 327, 328.

[4] (1828) 5 Russ. 45.

In the present case the judges have applied the principle and given reasons which show that it is salutary. In the Supreme Court Jackson J. said: "The principle is clear and well-"established and to hold otherwise would only tend to encourage "perjury and to seek to bolster up a case by later adducing "evidence which, had it been in existence, would or should have "been adduced at the first trial." In the Court of Appeal Manyo-Plange J. said [8]: ". . . what should the Omanhene of "Akim Abuakwa have done in the circumstances? In my view "he should have applied to be joined as co-plaintiff. He took "no such course. Being cognizant of the proceedings, he was "'content to stand by and see his battle fought by somebody "'else in the same interest': the interest is the same, because "the matter to be determined in the present action was the same "as was determined in the former action, namely, Muronam's "title to the land in dispute, without which Akim Abuakwa can-"not establish an interest in the land. Having stood by and seen "the battle fought to a finish to the disadvantage of Muronam, "he goes to sleep for nearly five years, then suddenly wakes up "and tries to re-open the question of Muronam's title to the "land in dispute which had been determined in the former "action."

Their Lordships are of opinion that the principle stated by Lord Penzance should be applied in this case unless technical

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[5] (1931) 1 W.A.C.A. 162, 167.
[6] (1932) 1 W.A.C.A. 253, 255.
[7] (1952) 14 W.A.C.A. 143.
[8] (1952) 14 W.A.C.A. 152.

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legal reasons exist which prevent its application. Their Lordships are unable to find any such reasons and are therefore of opinion that the principle was correctly applied.

This conclusion renders it unnecessary to decide whether Akim Abuakwa was a "privy" of Muronam so as to be estopped on that ground also, as was held by the West African Court of Appeal.

Their Lordships ought to notice one further argument. It was said that both Muronam and Banka were subordinate stools under the one paramount stool of Akim Abuakwa and that therefore there was no call on Akim Abuakwa to intervene, because its title would not be affected. The answer is, however, that whilst originally they may both have been subject to Akim Abuakwa, since 1907 Banka has never admitted that it was subordinate to Akim Abuakwa. In the proceedings in 1940 Banka said that the land belonged to Adansi and that Banka was only caretaker for Adansi. When Adansi's title was thus asserted, it was, as the Court of Appeal said, "clearly the duty of Akim "Abuakwa to intervene" if it had an interest in the land. Akim Abuakwa did not do so and cannot now be allowed to fight the battle all over again.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs.

Solicitors: *A. L. Bryden & Williams; T. L. Wilson & Co.*

C. C.

[HOUSE OF LORDS.]

H. L. (E.)*
1957
Apr. 8, 9;
May 29.

NATIONAL COAL BOARD . . . . APPELLANTS;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

Revenue—Profits tax—Allowances—Industrial buildings or structures—Dwelling-houses at colliery—Owned by mine owners—Occupied by miners—Value "when the mine . . . is no longer worked"—Income Tax Act, 1945 (8 *&* 9 *Geo.* 6, *c.* 32), *s.* 8 (3).

Several dwelling-houses at a colliery were owned by the National Coal Board and occupied by certain of its employees. In relation to its profits tax liability, it claimed annual allowances under Part I of the Income Tax Act, 1945, in respect of these houses on the ground that they were industrial buildings within the proviso to section 8 (3) of the Act and were "likely to have little or no "value to the person carrying on the trade when the mine . . . is "no longer worked." Even if mining operations ceased the houses were likely to have a substantial value to the board until 2091 (some 50 years before the seams were expected to be exhausted if they were worked till then) but after 2091 they would have little or no value:—

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* *Present*: LORD MORTON OF HENRYTON, LORD REID, LORD RADCLIFFE, LORD COHEN and LORD KEITH OF AVONHOLM.

Held, that the board was not entitled to the allowances, since the words of the proviso were intended to cover solely buildings which would only be of value during the continuance of the operations for the purposes of which they were constructed. What was being referred to was the circumstance of the mine ceasing to work, whenever that might be, not the date, necessarily unknown, when that circumstance would occur. It was assumed that the buildings in question would still then be in existence. Comparison between the expected life of the mine and the expected life of the houses was irrelevant.

Decision of the Court of Appeal (1956) 35 A.T.C. 305 affirmed.

APPEAL from the Court of Appeal (Singleton and Morris L.JJ., Romer L.J. dissenting).

This was an appeal from an order of the Court of Appeal dated July 24, 1956, allowing an appeal by the respondents, the Commissioners of Inland Revenue, from an order of the High Court (Roxburgh J.) dated March 2, 1956, whereby an appeal by the respondents on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts was dismissed and their determination was affirmed. The appeal related to profits tax and the matter arose on an assessment to profits tax made on the appellants, the National Coal Board, and based on the profits of their business of colliery proprietors for the chargeable accounting period represented by the calendar year 1951.

The question in dispute in the appeal, shortly stated, was whether, for the purposes of the assessment to profits tax, the appellants were entitled to capital allowances in respect of certain of their buildings under Part I of the Income Tax Act, 1945, which provides for such allowances for income tax purposes in respect of industrial buildings and which is applied to profits tax by section 46 of the Finance Act, 1947, and Part I of Schedule VIII thereto.

The buildings in respect of which the dispute arose were a number of dwelling-houses belonging to the appellants at Edwinstowe, in Nottinghamshire, which were built between 1926 and

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1928 for men in their employment at a colliery belonging to them at Thoresby, in Nottinghamshire, and which had always been occupied by men so employed. The question at issue was whether each several dwelling-house was such a building or structure as to fulfil the condition in the proviso to section 8 (3) of the Act of 1945 that it "is likely to have little or no value to the person "carrying on the trade when the mine, oil well or other source "or the plantation is no longer worked."

The point on the construction of the provision which was at issue was whether (as the appellants contended) one must first fix the date on which the mine, oil well or other source or the plantation in question would in fact no longer be worked and then determine whether the dwelling-house was likely to have little or no value at that date, or whether (as the respondents contended) one must ask oneself whether the dwelling-house was likely to have little or no value on the mine being no longer worked, whenever that might happen and for whatever cause it might happen. It was common ground that the life of the colliery would probably end in 2141, if working there continued in the manner now expected, and that in about 2091 the houses would have become of little or no value, having by that time exhausted their useful life as subjects of occupation. It was also agreed that if mining operations had stopped in 1951, or in any of a substantial number of years following, the houses would still have a substantial value.

John Pennycuick Q.C. and *Desmond Miller* for the appellant board. The purpose of the valuation is to ascertain whether, on the actual date when the mine ceases to be worked, the buildings will have little or no value to the person carrying on the trade comprising the mine. The relevant provisions of the Finance Act, 1945, are sections 1, 2, 8, 14, 16 and 27. See also Part I of Schedule VIII to the Finance Act, 1947. The question turns wholly on the proviso to section 8 (3) of the Act of 1945. It is whether, on its true construction, there is a likelihood that the houses will have little or no value to the appellants when the mine is no longer worked. The proviso requires that at the end of the basis period to which the assessment relates there must exist the probability of that state of affairs at an actual future date, the date upon which the mine will cease to be worked. The determination of this balance of probability depends on an estimation of two uncertain factors: (1) the future date on which the mine will cease to be worked, viz., the life of the mine, and (2) the value of the dwelling-houses to the appellants at that date. One can only make a valuation on the materials available. Thus, one cannot take into account the possibility of atomic energy superseding coal mines.

In the proviso the key word is "when," a temporal adverb denoting a particular point of time in a series of points of time. "When I die" refers to the moment of death. "When I am "dead" denotes a continuum beginning at a particular point of time. "When the mine . . . is no longer worked" denotes a particular point of time. Cessation of working is capable of estimation, though it cannot be precisely ascertained, as with the phrase "When I die." The Oxford English Dictionary, vol. X, pt. II, p. 24, gives the following definition of "when" (II, 4): "At the (or a) time at which; on the (or an) occasion on which." See also the definition of "whenever" at pp. 25–26.

In construing a statute it is not legitimate to start with an assumption as to its policy and then to give plain words a strained meaning to conform with that policy. The approach is different in the case of ambiguous words. There is nothing to show why the privilege here given is conferred on the trader named and not on others.

The Crown's contention involves taking a hypothetical cessation of working the mine on the last day of the basis year, although the mine is in fact still working then. It also involves reading "when" as "if" and turning everything into the conditional; it is not enough for the Crown's purposes to read "when" as "whenever." Section 14 (1) of the Act of 1945 may be read by way of contrast, since land is not, like a house, liable to depreciation, and the value of the work there referred to is constant. Note also the change of language in the proviso to section 14 (1), where the words used are "be valueless." This case depends on the actual meaning of the words used, their natural meaning; those words are only appropriate to refer to the actual cessation of working and are wholly inappropriate to refer to a hypothetical cessation forthwith, whereas the mine continues working. That is the basic submission of the appellants. Since the life of the mine is likely to be substantially longer than the physical life of the houses, they must succeed.

Geoffrey Cross Q.C. and *Sir Reginald Hills* for the respondents. The assessment was rightly made and the annual capital allowances claimed were rightly refused. Section 8 (3) starts with a general exclusion of dwelling-houses, but the proviso brings in certain dwelling-houses. The appellants' contention cannot be fitted into a coherent scheme. The basic fallacy in the judgments of Romer L.J. and Roxburgh J. was that they tied themselves to a purely temporal use of the word "when." This point was well dealt with by Morris L.J. in the Court of Appeal.[1] See the eighth definition of "when" in the Oxford English Dictionary: "With the notion of time modified by or merged in that of mere "connexion: In the, or any, case or circumstances in which." "When" can mean "whenever" or "if at any time," as in the phrase "when we have another child." "If at any time" gives enough scope for surmise as to futurity. Thus, one of the normal and recognized meanings of the word denotes any occasion on which the event in contemplation may take place. The contingency envisaged by the word "when" here is the mine no longer being worked for any reason and at any time. It is not the mine no longer being worked when, and only when, the seams are exhausted. The real question is: Can it be conceived that these houses will have a value apart from the mine? The answer might change from year to year. Buildings might at first be isolated but a town might grow up near them. The intelligible scheme of this enactment is that traders have often found themselves obliged to build dwellings for their workers in remote places where those houses can never have any value apart from the carrying on of the trade in question, with the result that if the trade is brought to an end for any reason the trader will lose the whole or substantially the whole of the value of the house. Section 8 (3) is dealing with that situation. In section 14 "when" cannot be referring to an actual point of time. It must mean "on the hypothesis that," for it does not follow that any particular structure is to be demolished. In the proviso to section 16 (2) the change of wording is very significant. The proviso to section 8 (3) is not confined to coal mines, let alone mines in England. It happens that this mine is in Nottinghamshire and that a lot is known about it. But it would be a formidable task to find evidence as to the probable life of mines and plantations all over the world to discover when they will no longer be worked.

John Pennycuick Q.C. in reply. "When" does not mean "in the imaginary event that." It means here the date at which the mine will actually be no longer worked. In its ordinary sense it is an adverb denoting the point of time at which an event happens or a tract of time during which a state of things continues. It can also denote a point of time at which an event will actually happen, although until it happens it is uncertain whether or not it will happen. The Crown's case involves reading "when" as "if." It has been suggested that it means "whenever." That word can denote two points of time, (a) the point of time when a single event happens, the point being at present unknown, and (b) a series of points of time, as in the phrase "whenever I go to London." Here the repetitive sense is out of the question because only a single event is indicated. It is also a misuse of "whenever" to use it in connexion with a single hypothetical event. "When" is never used to denote the imaginary happening of an event at a single point of time, which event does not in fact happen.

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[1] (1956) 35 A.T.C. 305, 311.

Their Lordships took time for consideration.

May 29. LORD MORTON OF HENRYTON. My Lords, I have had the privilege of reading in print the opinion which is about to be delivered by my noble and learned friend, Lord Radcliffe, and I agree with it, but I shall add a few words in view of the striking difference of judicial opinion which has arisen in this case.

Your Lordships have to construe the proviso to section 8 (3) of the Income Tax Act, 1945, and, in particular, the words "if "the building or structure is likely to have little or no value to "the person carrying on the trade when the mine, oil well or "other source or the plantation is no longer worked." Counsel for the appellant board claimed throughout his argument that the meaning which the board seeks to apply to the words in question is their "natural meaning," and that any other construction of the words involves either giving to them a strained or unnatural meaning, or inserting into the section words which are not there.

My Lords, I reject this claim. To my mind, the most natural meaning of the words used is the meaning attributed to them by the majority of the Court of Appeal, and it is the meaning which the words at once conveyed to my mind when they were first read by counsel for the board. I think it would be a natural and correct use of language if a valuer expressed himself as follows, after viewing a row of miners' cottages beside a mine in a lonely and desolate spot: "In my opinion, these cottages will have little "or no value to the owners when the mine is no longer worked. "When that time comes it will be impossible for the owners to "sell or let these cottages, because they are so far from any town "or village." A case of this kind would be, in my opinion, an example of the situation which the legislature had in mind when the proviso to section 8 (3) of the Act of 1945 was enacted.

I do not see any necessity for inserting any words into the proviso, but if I sought to expand the phrase " when the mine is " no longer worked " so as to make its meaning clear beyond any possibility of doubt, I should insert after the word " when " the words with a scriptural flavour " it comes to pass that."

Having regard to the course which this case has so far taken, I realize that the words in question cannot be as clear as they seem to me. In my opinion, however, any doubt is removed when one considers the context in which these words appear, and the general scheme of allowance to industrial buildings which is revealed in the Income Tax Act, 1945. On this part of the matter I can add nothing to the opinion of Lord Radcliffe.

I would dismiss the appeal.

LORD REID. My Lords, I agree.

LORD RADCLIFFE. My Lords, the question raised by this appeal is whether the National Coal Board is entitled to claim the annual tax allowance for industrial buildings and structures in respect of a number of dwelling-houses at Edwinstowe, in Nottinghamshire, which belong to the board and are occupied by some of its employees who work at Thoresby Colliery in the same county.

The tax against which the allowance is sought is profits tax assessed upon the board's profits for the chargeable accounting period represented by the calendar year 1951. Nothing, however, turns upon the details or the machinery of the assessment. It is common ground that the validity of the claim depends upon the true construction of section 8 of the Income Tax Act, 1945, in particular subsection (3) of that section, as applied to the circumstances of this case; and that the allowances given by that section, if admissible in the assessment of profits under Schedule D of the Income Tax Act, 1918, would also be admissible in a profits tax assessment for the comparable period or periods.

The point was presented to us as a very short one. Do these houses come within the description which is found in the proviso to section 8 (3), " a building or structure . . . likely to have little " or no value to the person carrying on the trade when the mine, " oil well or other source or the plantation is no longer worked " ? It was even said that the whole point at issue turns upon the meaning to be assigned to the word " when " in that sentence. My Lords, I agree that the point is indeed a short one; and, perhaps, in one sense it may be said that the issue comes down to one of deciding what the word " when " means in the context of the proviso which I have just quoted. Nevertheless, the solution has produced a diversity of judicial opinion. The Special Commissioners held that the houses did qualify for allowance. On appeal to the High Court, Roxburgh J. agreed with them. The Court of Appeal by a majority reversed this decision, Singleton and Morris L.JJ. holding that the allowance was not claimable, Romer L.J. in a dissenting judgment holding that it was. I think myself that the true meaning and effect of the proviso are better ascertained by setting it in the context of the general scheme of industrial building allowance introduced by the Income Tax Act, 1945, than by concentrating any close attention upon the rich variety of permissible uses which the English language allows to the word " when."

As is well known, the 1945 Act introduced into our tax code the first general scheme for the allowance of depreciation in tax assessments. Even then, though general, the scheme was by no means comprehensive. The first six Parts of the Act, extending from section 1 to section 47, classified allowable expenditure under separate heads, industrial buildings and structures, machinery and plant, mines and oil wells, agricultural land and buildings, patents, scientific research. No place was found for expenditure on dwelling-houses in this scheme except so far as it ranked as expenditure on an industrial building under the special provisions of Part I, with which we are now concerned, or as expenditure on a farm-house or cottage under section 33, which appears in Part IV.

The effect of the allowances given by Part I was to provide an initial allowance of one-tenth and an annual allowance of one-fiftieth of his capital expenditure to every person who incurred such expenditure on an industrial building or structure occupied for purposes of trade. Thus, by the end of 45 years, ignoring complications, the whole of the original capital expenditure would have been written off as an allowance against assessable profits. The definition of what was meant by " industrial building or " structure " for this purpose was supplied by section 8. The scheme of that section is that by subsection (1) the expression " industrial building or structure " is defined as meaning a building or structure in use for any one of a number of industrial purposes which are there listed, including, in sub-head (*e*), " . . . " the purposes of a trade which consists in the working of any " mine, oil well or other source of mineral deposits, or of a foreign "plantation": by subsection (2) provision, not now material, is made for applying the section to a part of a trade or undertaking where it cannot be applied to the whole; and subsection (3) is in the following terms: "Notwithstanding anything in subsection (1) "or subsection (2) of this section, but subject to the provisions of "subsection (4) of this section, the expression 'industrial building "'or structure' does not include any building or structure in use "as, or part of, a dwelling-house, retail shop, showroom, hotel or "office or for any purpose ancillary to the purposes of a dwelling-"house, retail shop, showroom, hotel or office: Provided that "this subsection shall not apply to, or to part of, a building or "structure which was constructed for occupation by, or for "the welfare of, persons employed at, or in connexion with the "working of, a mine, oil well or other source of mineral deposits, "or for occupation by, or for the welfare of, persons employed "on, or in connexion with the growing and harvesting of the "crops on, a foreign plantation, if the building or structure is "likely to have little or no value to the person carrying on the "trade when the mine, oil well or other source or the plantation "is no longer worked, or will cease to belong to such person on "the coming to an end of a foreign concession under which the "mine, oil well or other source, or the plantation, is worked."

It seems to me fairly plain what these rather complicated provisions were intended to secure. The general rule was to be that capital expenditure on dwelling-houses, retail shops, showrooms, hotels or offices was not to rank as industrial expenditure or, accordingly, to rank for depreciation allowance, even though it was made or they were occupied for purposes of trade. But a special exception was to be made in taxing the profits arising from the working of mines, oil wells and foreign plantations. Capital expenditure on dwelling-houses, etc., put up by those conducting such enterprises could be treated as industrial expenditure and allowed accordingly if the assets created by the expenditure were so intimately connected with the enterprise, either by character, situation or the terms of working imposed by a foreign concession, that they could not be expected to have any value apart from their contribution to the conduct of the enterprise. In the special circumstances thus envisaged, expenditure upon the construction of such dwelling-houses was in truth expenditure on an industrial building and nothing else, and, unlike expenditure on other dwelling-houses, its useful life must necessarily expire with the expiry of the working of the mine, oil well or plantation or, alternatively, its value to the trader disappear with the end of the concession.

It is common knowledge that many mines, oil wells and plantations worked abroad by traders taxable in this country are in isolated places. Townships, large or small, have to be created, with dwelling-houses, shops, and offices, for the occupation of those serving the enterprise in these remote spots. So far as this country is concerned, the mining camp has never been one of its features; and the mining village which was wholly dependent upon the continued working of the local mine is, I dare say, becoming a thing of the past. But that means only that there will be less occasion for conceding the allowance in respect of dwelling-houses in this country than in respect of dwelling-houses, differently situated, overseas.

Now, the houses which are the subject of the present appeal have, in my opinion, very little to do with the kind of scheme that I have outlined above. It is true that they were built between 1926 and 1928, and were built for, and have always been occupied by, men employed at Thoresby Colliery. But there is no suggestion that their value as houses is confined to their use for housing Thoresby miners. On the contrary, it is agreed that if mining operations had stopped there in 1951 or 1952, or in any of a number of years following, the houses would still have had or have a substantial value. In other words, they are dwelling-houses in their own right: the expenditure on them cannot be described as expenditure that was exclusively devoted to the mining enterprise at Thoresby or as having little or no value apart from the continuance of the enterprise. Prima facie, therefore, they do not come within the scope of the proviso.

The board's claim to allowance rests, however, on a different consideration. In effect it depends on a comparison of the expected physical life of the houses with the expected working life of the colliery. There is an agreement between the parties that the life of the colliery will probably end in the year 2141, if working there continues in the manner now expected. It is also agreed that about the year 2091 the houses would have become of little or no value, having by that time exhausted their useful life as subjects of occupation. From the comparison of these figures, which have not, of course, the precision of astronomical calculations, it is deduced that the houses can be described as likely to have little or no value at the time when the mine is no longer worked and, therefore, that the expenditure on them is within the proviso to subsection (3) of section 8.

The majority members of the Court of Appeal found themselves somewhat startled at the idea that the Income Tax Act should have produced a scheme under which tax allowances are conceded or withheld in accordance with estimates of this kind. And, indeed, it is not easy to take the figures too seriously. The Special Commissioners supported their decision in favour of the board by accepting as reasonable two suppositions: (1) that coal will continue to be extracted from the mine at the present rate of extraction, and (2) that nothing will happen to result in a premature closing of the mine before the seams are exhausted. I dare say that these may be reasonable suppositions about a period of some 180 years of the future. But I could not infer from that that they are the only reasonable suppositions about such a matter. I can think of two others: (1) that coal will not continue to be extracted from the mine over the period of its working at the same average rate as prevails today, and (2) that something will happen which will result in a premature closing of the mine before the seams are exhausted. Could anyone say today which suppositions are the more reasonable? In the nature of things there can be no great validity about any of them.

Nevertheless, in my opinion, the board's argument does not fail by reason of any special vagueness in the calculations it invites. We can accept its general premise that Thoresby Colliery is a coal mine with a very long expected life, and that the life of the mine is likely to be substantially longer than the physical life of the houses. Where I think that the board's argument fails is that this consideration is not relevant to the proviso which confers the allowance. The value to be taken account of for that purpose is value as affected by the circumstance of the closing of the mine: it is not value as affected by the normal physical decay of the building itself. All that is proved by the comparison which the board invites between the expected life of the mine and the expected life of the houses is that the owner is never likely to be threatened with any loss of the value of his expenditure on housing by reason of the close of the industrial enterprise, because the enterprise is likely to be longer lived even than an ordinary dwelling-house. That comparison takes the case away from the special cases for which the proviso is designed. It contributes nothing to bring it within the proviso.

The argument for the board has been rested throughout on the proposition that the "natural meaning" of the words of the proviso necessarily covers its claim and that is all that matters. And this argument has received much support in the judgments that have been given in the earlier courts. I do not think that it is all that matters, anyway: but, that apart, I do not agree that the construction contended for does represent any natural meaning of the relevant words. Such a construction involves treating the words " when the mine . . . is no longer worked " as if they were the equivalent of the words " when the mine . . . " is likely to be no longer worked ": and they are not the equivalent. The date when an event occurs is not the same thing as the date when, as seen at any one moment, it is thought likely to occur. What is being referred to is the circumstance of the mine ceasing to work, whenever that may be, not the date, necessarily unknown, when that circumstance will occur. Secondly, if the figures put forward by the board are to be our guide, it is not a natural use of words to say of these houses that they are likely to be of little or no value when the mine stops working. What would be accurate would be to say of them that they cannot possibly be of any value on that event because they will not exist to have value attributed to them. They will have ceased to exist for any purpose some two generations of human life before!

These considerations help to show, I think, what it is that the proviso is confined to allowing. The wording may not be very happy and there may be other difficulties in applying it which have not yet appeared. But the general range of circumstances to be covered by the exemption is reasonably clear. The assumption which underlies the exemption is that the building in question is in existence at a date, whatever it may be, when the industrial enterprise itself comes to an end or, in the case of a concession, comes to an end for its owner by the expiry of the concession. The question to be asked, in order to see whether it qualifies for allowance now, is whether it is of such a character or so situated, or, in the case of a concession, whether the terms of the concession are such that, in the event postulated, the capital expenditure incurred in respect of the building would be likely to have any appreciable residual value for the owner. If the answer is " Yes," then the expenditure does not qualify for industrial allowance: if the answer is " No," it does.

I would dismiss the appeal. The houses are shown to have a likely alternative use as ordinary dwellings and they are not, therefore, within the proviso.

LORD COHEN. My Lords, I agree with the speech delivered by my noble and learned friend, Lord Radcliffe, and have nothing to add.

LORD KEITH OF AVONHOLM. My Lords, I also agree.

Appeal allowed.

Solicitors: *Donald Haslam; Solicitor of Inland Revenue.*

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ABDUL CADER ABDEEN . . . . APPELLANT;

AND

ABDUL CAREEM MOHAMED THAHEER AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Specific performance — Contract — Land—Roman-Dutch law—Legal right to demand performance of contract — Overriding discretion of court to refuse — Right excluded by substituted obligation for damages.

Roman-Dutch Law — Specific performance — Whether absolute right — Distinction between Roman-Dutch and English law.

Vendor and Purchaser—Specific performance—Contracting out of right —Clause in contract fixing liquidated damages for failure to complete.

Unlike the law of England, where courts of Chancery, in developing the rules of equity, assumed and exercised jurisdiction to decree specific performance of contractual obligations in appropriate cases, under Roman-Dutch law every party who is ready to carry out his term of the contract prima facie enjoys a legal right to demand performance by the other party; and this right is subject only to the overriding discretion of the court to refuse the remedy in the interests of justice in particular cases.

An agreement for the purchase by the appellant from seven joint owners of certain house property in Colombo provided in clause 8: "In the event of the purchaser being ready and willing "to complete the said sale in terms hereof and the vendors failing, "refusing or neglecting to execute . . . the deed of transfer . . . "then . . . the vendors shall . . . pay to the purchaser a sum of

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* *Present*: LORD OAKSEY, LORD MORTON OF HENRYTON, LORD KEITH OF AVONHOLM, LORD BIRKETT and the RT. HON. L. M. D. DE SILVA.

"Rs.15,000 as liquidated and ascertained damages and not as "penalty." Two of the joint owners having refused to execute any conveyance, the appellant began proceedings against them to enforce specific performance of their share of the premises. He contended that clause 8 stipulated not for an alternative or substituted method of performance of the contract but only for damages for breach of it, and that that was no bar to a decree for specific performance:—

Held, that the prima facie right of the appellant to demand specific performance was excluded by the terms of the contract, particularly clause 8, which constituted a substituted obligation and the sole obligation on the vendors in the event of the failure to secure a conveyance of the whole property to the appellant by reason of any of the contingencies contemplated by the parties in that clause. A refusal or failure by one vendor would be sufficient to bring clause 8 into operation.

Judgment of the Supreme Court of Ceylon (1955) 57 N.L.R. 1 affirmed.

APPEAL (No. 20 of 1956) from a judgment of the Supreme Court of Ceylon (June 10, 1955), reversing a judgment of the District Court of Colombo (November 1, 1951).

The following facts are taken from the judgment of the Judicial Committee: The case arose out of a contract of purchase and sale dated October 3, 1947, of certain house property in Colombo. The appellant was the purchaser. The vendors were seven joint owners of 151 shares out of 192 undivided shares of this land. The joint owners of the other 41 shares were four minors who were not parties to the contract. Their curators were subsequently authorized by the court to sell their shares. Of the seven part joint owners, parties to the contract, five executed, on January 2, 1948, an appropriate deed of conveyance in the appellant's favour. The other two refused to execute any conveyance and give vacant possession because they could not get another house. On March 17, 1948, the appellant commenced proceedings in the District Court of Colombo seeking a decree against those two vendors to execute in his favour a conveyance of their share of the premises in question. Before those proceedings were taken one of the recusant vendors had transferred his share to his minor children without valuable consideration and they were accordingly made parties to the proceedings. The District Judge held that that transfer was ineffective to interfere with the purchaser's rights. That was not now in question in the case.

The only question before the Board was whether the appellant was entitled to enforce specific performance against the recusant

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defendants. The District Court (Sinnethamby D.J.) held that he was. The Supreme Court (Gratiaen, Pulle and Sansoni JJ.) held that he was not. The question fell to be determined on the language of the contract considered in the light of the Roman-Dutch law ruling in Ceylon in the matter of specific performance.

The contract was as follows: "This agreement is made third "day of October, one thousand nine hundred and forty-seven "between Abdul Careem Mohamed Thaheer [and six others] all "of No. 43, Barnes Place, in Colombo, in the Island of Ceylon "(hereinafter called and referred to as 'the said vendors' which "term as herein used shall where the context so requires or "admits mean and include the said Abdul Careem Mohamed "Thaheer [and the six others], their and each of their respective "heirs, executors and administrators) of the one part and Abdul "Cader Abdeen of Colombo aforesaid (hereinafter called and "referred to as 'the said purchaser' which term as herein used "shall where the context so requires or admits mean and include "the said Abdul Cader Abdeen, his heirs, executors and administrators) of the other part.

"Whereas the vendors are seised and possessed of or otherwise well and sufficiently entitled jointly to an undivided "one-hundred and fifty-one upon one-hundred and ninety-two "(151/192) parts or shares from and out of all those premises in "the Schedule hereto particularly described.

"And whereas Zainul Abdeen, Umma Faiza, Hussain Lafir "and Abdul Careem Mohamed Abdul Cader, (minors,) all of "No. 43, Barnes Place aforesaid are jointly entitled to the "remaining forty-one upon one-hundred and ninety-two (41/192) "parts or shares from and out of the said premises in the said "schedule hereto particularly described.

"And whereas the vendors have agreed to sell and to cause to "be sold and the purchaser has agreed to buy the said premises "in the said Schedule hereto particularly described at the price "and upon the terms and conditions hereinafter set forth.

"Now this agreement witnesseth as follows:—

"1. The vendors will sell and cause to be sold and the "purchaser will subject expressly to the provisions of clauses 4 "and 5 hereof buy the said premises in the said Schedule hereto "particularly described together with all and singular the rights, "privileges, easements, servitudes and appurtenances whatsoever thereto belonging or appurtenant thereto or used or enjoyed "therewith.

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"2. The price shall be the sum of rupees ninety-two thousand "(Rs. 92,000/–) of which a sum of rupees twelve thousand five "hundred (Rs. 12,500/–) by way of deposit has been paid to the "vendors by the purchaser (the receipt whereof the said vendors "do hereby admit and acknowledge) and the balance shall be "paid on the date the purchase is completed.

"3. The sale shall be completed on or before the 31st day of "December, 1947, by the purchaser: (*a*) tendering to the vendors "for execution at the office of Mr. John Wilson, proctor and "notary, 365, Dam Street, Colombo, a transfer in the customary "form of the said premises hereby agreed to be sold in favour "of the purchaser or his nominee or nominees the same to be "attested by the purchaser's or his nominee or nominee's notary. "The vendors in and by the said deed of transfer shall warrant "and defend the title to the said one-hundred and fifty-one upon "one-hundred and ninety-two (151/192) parts or shares of the "said premises in the said Schedule hereto particularly described "and enter into other usual covenants; (*b*) paying to the vendors "and depositing to the credit of curatorship proceedings in the "District Court of Colombo relating to the estates of the said "minors the balance purchase price of rupees seventy-nine "thousand five-hundred (Rs. 79,500/–) and thereupon the "vendors shall execute and cause to be executed at the cost and "expense of the purchaser the deed of transfer in favour of the "purchaser or his nominee or nominees as aforesaid.

"4. Vacant possession of the said premises in the said "schedule hereto particularly described shall be given by the "vendors to the purchaser at least one day prior to the execution "of the said deed of transfer.

"5. The vendors shall deduce to the satisfaction of the said "Mr. John Wilson a good and indefeasible title to the said "premises in the said schedule hereto particularly described.

"6. The purchaser shall give to the vendors at least seven "days' notice of the date on which the purchaser intends to complete the sale so as to enable the vendors to give to the "purchaser vacant possession as aforesaid of the said premises in "the said schedule hereto particularly described.

"7. In the event of the purchaser dying prior to the said 31st "day of December, 1947, these present shall stand cancelled and "determined and the vendors shall forthwith pay to the legal "representatives of the purchaser the said deposit of rupees "twelve-thousand five-hundred (Rs. 12,500/–).

"8. In the event of the purchaser being ready and willing to "complete the said sale in terms hereof and the vendors failing, "refusing or neglecting to execute and cause to be executed the "said deed of transfer as aforesaid then and in such case the "vendors shall repay forthwith to the purchaser the said deposit "of rupees twelve-thousand five-hundred (Rs. 12,500/–) together "with interest thereon at five per centum per annum from the "date hereof to date of payment and shall also pay to the "purchaser a sum of rupees fifteen-thousand (Rs. 15,000/–) as "liquidated and ascertained damages and not as penalty.

"9. In the event of the vendors deducing a good and inde- "feasible title to the satisfaction of the said Mr. John Wilson "and being ready and willing to execute or cause to be executed "prior to the 31st day of December, 1947, the said transfer and "to give vacant possession as aforesaid and the purchaser failing, "refusing or neglecting to complete the purchase as aforesaid the "purchaser shall pay to the vendors a sum of rupees fifteen- "thousand (Rs. 15,000/–) as liquidated and ascertained damages "and not as penalty and the vendors shall refund to the pur- "chaser the said deposit of rupees twelve-thousand five-hundred "(Rs. 12,500/–)."

1958. January 14, 15. *Stephen Chapman Q.C.* and *R. K. Handoo* for the appellant. The point, shortly, is whether the right to specific performance under Roman-Dutch law of a contract to buy or sell land is affected by the fact that in the contract there is a provision for payment of liquidated damages in the event of a breach of the contract. Under Roman-Dutch law the innocent party's remedy by way of specific performance is even stronger than it is in English jurisprudence. In England it is a purely discretionary remedy arising from the action of the courts of equity in exercising discretion. In Roman-Dutch law it has been laid down quite clearly that it is a legal right of the innocent party prima facie to have specific performance of a contract by the other side. Discretion only comes in under Roman-Dutch law the other way round from the English law—one starts with a legal right, and there is a discretion in the court in certain circumstances to refuse the right. So, here, the appellant, an innocent party, in Roman-Dutch law starts off with the legal right to specific performance as a matter of substantive law, and has not to invoke discretion. Being ready and willing to perform his part of the bargain, he is entitled as of right to specific performance, irrespective of whether or not damages would be more appropriate, and this right to specific performance cannot, on any reasonable interpretation of the agreement, be said to have been either expressly or impliedly excluded by its terms. For the principles of Roman-Dutch law in relation to specific performance, see Lee's An Introduction to Roman-Dutch Law, 4th ed., p. 268; 5th ed., p. 265, and in amplification of that the article on "Specific Performance of Contracts in South "Africa" by Philip Gross in the South African Law Journal (1934), vol. 51, p. 347, at pp. 354–355, which was accepted by Lee in Appendix I, at p. 448 of the 4th edition of his Roman-Dutch Law.

On the position where there is in the contract a specific provision dealing with liquidated damages, it is desired to establish the reliability in general of the mass of English cases on the subject in view of the very close similarity of the two systems of jurisprudence on the point. The cases in Ceylon do not appear to be of much assistance in solving the problem of this contract —there are decisions both ways; and there appears to be no specific South African case where this point has been dealt with. [Reference was made to Wessels' Law of Contract in South Africa, 2nd ed. (1951), vol. 2, p. 827, paras. 3102, 3103.] With regard to the similarity of the two systems—English and Roman-Dutch—see Fry on Specific Performance, 6th ed. (1921), p. 65 et seq., paras. 140, 142, 144, 146, 147, 150 and 153, where in paragraph 142 it is stated that there are three classes of contract of this kind: first, where the sum mentioned is strictly a penalty and intended to secure performance; secondly, where a sum named is to be paid as liquidated damages, and, thirdly, where the sum named is to be substituted for performance. Fry in paragraph 146 states a proposition which absolutely and directly covers the present case: "For according to common law, if the "sum named is not a penalty, but the agreed amount of liquidated "damages, the contract is satisfied either by its performance "or the payment of the money. But as regards the equitable "remedy the distinction is unimportant: for the fact that the "sum named is the amount agreed to be paid as liquidated "damages is . . . ineffectual to prevent the court from enforcing "the contract in specie."

Williams on Vendor and Purchaser, 4th ed. (1936), vol. 2, p. 1048, draws a distinction, which, it is maintained, is valid, between where the contract provides by way of performance that the obligor can do either A or B, and where the obligation has a single object to produce a single result and the contract merely says what is to happen in the event of breach. The two principles are fundamentally distinct. It is not an obligation under a contract to pay damages for breach of it; it cannot be performance of any contract to pay damages for its breach—it is a contradiction in terms.

The stipulation for liquidated damages does not debar the remedy of specific performance. That is the principle which is established on the authorities cited in Fry, and this clause 8 operates on the background of that principle. In other words, the inclusion in the clause of the stipulation as to liquidated damages does not prevent the court from exercising its jurisdiction and saying that it is going to prevent the breach by ordering specific performance. If what the contract stipulates is not an alternative or substituted method of performance, but what damages are to be paid in the event of a breach of the obligation in the deed, that situation is no bar to a decree of specific performance. In the ultimate analysis, one has to come to a conclusion as to the proper classification of this clause 8; is it a clause dealing with damages in the event of a breach, or is it a clause providing that the vendor has his option to carry out a substituted obligation? The Supreme Court said that it was in the latter category, i.e., the third category of Fry.

Clause 8 does certainly debar the appellant from recovering anything else by way of damages, because the contract provides what in the way of damages he is to recover; but it cannot bar specific performance. It is not an alternative or substituted method of performance. The District Judge's judgment is entirely in accordance with the correct principles applicable and is right. If, contrary to the above submission, it is a substituted obligation, then it is conceded that the consequence is that performance of that substituted obligation is a complete answer to a decree of specific performance. The only question here is whether clause 8 falls within the second or the third of Fry's categories, and it is submitted that it is within the second.

So far the argument has proceeded on the basis that this is a clause dealing with liquidated damages and not one providing for alternative or substituted methods of performance. If that is wrong and clause 8 is to be construed as to mean that the appellant's sole remedy upon default by the vendors was the recovery of the sum named as liquidated damages, yet the default contemplated and, indeed, so expressed, was a default by all the vendors rendering them all jointly and severally liable, and not by only some of them for which all the vendors—i.e., those in default and those who were not—were to be liable.

The respondents did not appear and were not represented.

February 11. The judgment of their Lordships was delivered by LORD KEITH OF AVONHOLM, who stated the facts set out above and continued: In the admirable judgment of Gratiaen J. there appears this passage, which their Lordships entirely accept: "In "this country, the right to claim specific performance of an "agreement to sell immovable property is regulated by the "Roman-Dutch law, and not by the English law. It is important "to bear in mind a fundamental difference between the jurisdic-"tion of a court to compel performance of contractual obligations "under these two legal systems. In England, the only common "law remedy available to a party complaining of a breach of "an executory contract was to claim damages, but the Courts "of Chancery, in developing the rules of equity, assumed and "exercised jurisdiction to decree specific performance in appro-"priate cases. Under the Roman-Dutch law, on the other hand, "the accepted view is that every party who is ready to carry "out his term of the bargain prima facie enjoys a legal right to "demand performance by the other party; and this right is "subject only to the overriding discretion of the court to refuse "the remedy in the interests of justice in particular cases."

Proceeding from this starting point, the judge reaches the conclusion that the prima facie right of the purchaser to demand specific performance is excluded by the terms of the contract between the parties, particularly by clause 8, which he holds constitutes a substituted obligation and the sole obligation upon the vendors in the event of the failure to secure a conveyance of the whole property to the purchaser by reason of any of the contingencies contemplated by the parties in clause 8. He continues in a further passage which their Lordships would again quote in full: "It is only in the absence of agreement to the "contrary that the Roman-Dutch law confers on a purchaser "under an executory contract the right to select one of two "alternative legal remedies under the Roman-Dutch law, "namely, specific performance *or* damages. But we have here "a categorical stipulation that if the primary obligation is not "fulfilled for any reason whatsoever, two specified sums shall "immediately become due. To my mind, the stipulated return "of the deposit, being part of the purchase price, necessarily "implies that the primary obligation to sell is then to be regarded "as having come to an end. This negatives an intention that "the purchaser could still demand, if he so chose, specific performance. It is also significant that, when one considers the "relevant issue of mutuality, clause 9 provides that, should the "purchaser default for any reason, he would, though liable to "pay an agreed sum to the vendors as liquidated damages, be "entitled to a refund of his earlier deposit. Clause 9 equally "denies to the 'vendors' by necessary implication the alternative "legal remedy of specific performance."

In his very full and able argument for the appellant Mr. Chapman urged that clause 8 stipulated not for an alternative or substituted method of performance of the contract but only for damages for breach of the contract and that this was no bar to a decree for specific performance. For reasons, however, which do not materially differ from those which found favour with Gratiaen J., their Lordships are unable to accept the contention for the appellant. Their Lordships will state these reasons shortly under four heads.

First, where the right in general of a party to insist on specific performance of his contract or to claim damages is so clear under the Roman-Dutch law, their Lordships have difficulty in appreciating why the parties should introduce into the contract the detailed and meticulous provisions of clauses 8 and 9 merely to fix the amount of damages in the event of the court finding itself unable or unprepared to give decree of specific performance.

Secondly, the general framework of the contract suggests that clauses 7, 8 and 9 were designed to introduce modifications of what would otherwise be, subject to certain minor conditions, the unqualified obligation to sell or cause to be sold the property in question. Clause 7 is a clear modification of the legal consequences ordinarily following on a contract of sale, and clauses 8 and 9 are capable of a similar interpretation. Each of the clauses relates to a specific event or events which may follow the signing of the contract and provides for the consequences to follow thereon.

Thirdly, clause 8 makes no distinction between failure, refusal or neglect to execute or cause to be executed the deed of transfer. The same consequences are to follow from any of these events. Failure might have proceeded, though in this case it did not, from the refusal of the court to sanction and authorize a sale by the curators of the minor part-owners. In such an event the purchaser's only remedy would be under clause 8. The view of

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the Supreme Court was that this was a substituted obligation on the vendors who, having undertaken to cause a transfer to be executed, would be liable to pay to the purchaser the agreed sum of damages. Their Lordships see no reason to dissent from this view, and it is impossible in their opinion to differentiate between such a failure and a refusal of one of the parties to execute a transfer, which it is to be noted again results in a failure of the other vendors to cause a transfer to be executed.

Lastly, clause 8 provides that on the occurrence of any of the events contemplated the vendors shall repay " forthwith " to the purchaser the deposited sum with interest at the rate of five per centum per annum. This, in their Lordships' view, points strongly to the construction that in the events contemplated the bargain for a sale has come to an end and has been replaced by the pecuniary stipulations in the clause. It is further significant, as Gratiaen J. points out, that there is a corresponding mutuality of obligation on the purchaser in clause 9 in the event of his failing, refusing or neglecting to complete the purchase.

It remains to notice a contention which may not have been submitted to the Supreme Court but which was pressed before their Lordships' Board. It is expressed in the sixth ground of appeal as follows: " Because even if clause 8 be so construed as " to mean that the purchaser's sole remedy upon default by the " vendors was the recovery of the sum named therein as " liquidated damages, yet the default contemplated and, indeed, " so expressed, was a default by all the vendors rendering them " all jointly and severally liable, and not by only some of them " for which all the vendors (i.e., those in default and those who " were not) were to be liable." In their Lordships' view this point fails at the outset because in fact there was a failure on the part of all the vendors, as has already been indicated, either to execute or " to cause to be executed " the deed of transfer. But their Lordships think that in any event a refusal or failure by one vendor would be sufficient to bring the clause into operation.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed.

Solicitors: *Lee & Pembertons.*

C. C.

[HOUSE OF LORDS.]

H. L. (E.)*

1957
Mar. 4, 5, 6, 11;
May 14.

BRITISH TRANSPORT COMMISSION . . APPELLANTS;
AND
WESTMORLAND COUNTY COUNCIL . . RESPONDENTS.

SAME . . . . APPELLANTS;
AND
WORCESTERSHIRE COUNTY COUNCIL . RESPONDENTS.

CONSOLIDATED APPEALS.

Railway—Powers—Bridges—Right of way—Dedication—Footpath over private accommodation bridge—Presumption of dedication—Long user by public — Power of railway authority to dedicate — Test — Consistency with purposes of railway—Question of fact—Railways Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 20), *ss.* 16, 68—*National Parks and Access to the Countryside Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 97), *s.* 31.

Corporation—Powers—Alienation of land—Land held under statutory powers for public benefit—Compatibility with statutory objects—Easement—Dedication of highway—Footpath over private accommodation bridge over railway.

Highway. Fact or Law.

A footpath across a bridge spanning a railway line constructed in 1845 under powers conferred by a private Act of Parliament was marked on a provisional map prepared by a county council pursuant to the National Parks and Access to the Countryside Act, 1949, as a public right of way as at November 1, 1952. The railway owners applied to quarter sessions under section 31 of the Act for a declaration that no right of way existed over the bridge. Quarter sessions found that the bridge had been built solely as a private accommodation bridge for the benefit of the owners and occupiers of the lands on either side of the railway line, which had severed them, and that it had never been expressly dedicated to the public but its use by the public over a period of more than 20 years had been such as to raise a presumption that it had been dedicated. They found that the continued existence of the bridge would not endanger the running of the trains nor the operation of the railway, and held that the footpath had been dedicated:—

Held, that the footpath had been dedicated, notwithstanding that the railway authority held the land under statutory powers conferred on it for the public benefit and it was empowered by section 16 of the Railways Clauses Consolidation Act, 1845, to discontinue the accommodation bridge, for the sole test to be applied of its power to dedicate the footpath was whether the public use of the footpath as a highway was incompatible with the statutory objects of the authority.

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD RADCLIFFE, LORD COHEN and LORD KEITH OF AVONHOLM.

The question whether a dedication was or was not incompatible with those statutory objects was one of fact. Compatibility could be established without showing that in no conceivable circumstances could the dedication at any future time or in any way possibly interfere with those objects. Regard must be had to what could reasonably be foreseen and guarded against and not to that which, though possible, could fairly be said to be improbable.

Rex v. *Inhabitants of Leake* (1833) 5 B. & Ad. 469; *Birkdale District Electric Supply Co. Ltd.* v. *Southport Corporation* [1926] A.C. 355; 42 T.L.R. 303; *South Eastern Railway Co.* v. *Cooper* [1924] 1 Ch. 211; and *South Eastern Railway Co.* v. *Warr* (1923) 21 L.G.R. 669 applied.

Ayr Harbour Trustees v. *Oswald* (1883) 8 App.Cas. 623 and *Paterson* v. *Provost, etc., of St. Andrews* (1881) 6 App.Cas. 833 distinguished.

Dicta in *Mulliner* v. *Midland Railway Co.* (1879) 11 Ch.D. 611 disapproved.

Decision of the Court of Appeal [1956] 2 Q.B. 214; [1956] 2 All E.R. 129 affirmed.

Appeals from the Court of Appeal (Singleton, Jenkins and Hodson L.JJ.).

These were appeals from orders of the Court of Appeal dated March 22, 1956, affirming orders dated January 23, 1956, of the Queen's Bench Division (Lord Goddard C.J., Stable and Ashworth JJ.), whereby it ordered:

(1) That the order made by the appeals committee of the quarter sessions of the peace for the County of Westmorland "on April 5, 1955, dismissing an application made by the "appellants" (the British Transport Commission) "pursuant to "section 31 of the National Parks and Access to the Countryside Act, 1949, for a declaration that on August 1, 1952, no "public right of way existed over a bridge spanning certain lines "of railway owned and occupied by the appellants in the Borough "of Kendal in the County of Westmorland delineated upon a "provisional map prepared by the respondents" (the Westmorland County Council) "pursuant to the said Act and thereupon "shown to be crossed by a footpath numbered 29 be affirmed."

(2) That the order made by the appeals committee of the quarter sessions of the peace for the County of Worcester "on "March 23, 1955, dismissing an application made by the appellants pursuant to section 31 of the National Parks and Access "to the Countryside Act, 1949, for a declaration that on

"November 1, 1952, no public right of way existed upon "certain lines of railway owned and occupied by the appellants "in the urban district of Malvern in the said county delineated "upon a provisional map prepared by the respondents" (the Worcestershire County Council) "pursuant to the said Act and "thereupon shown to be crossed by a footpath numbered 158 be "affirmed."

It is sufficient to set out the facts and contentions relating to the first appeal. These were stated by Viscount Simonds as follows: The appeal in the Westmorland case was brought from an order of the Court of Appeal whereby that court unanimously dismissed an appeal from a decision of the Divisional Court of the Queen's Bench Division which had been given upon a case stated by quarter sessions of the peace for the County of Westmorland. The case stated was consequent on an order of sessions dismissing an application by the appellants for a declaration that no public right of way existed over a bridge spanning certain lines of railway owned and occupied by the appellants in the borough of Kendal in the same county.

The jurisdiction of quarter sessions arose in this way. By section 27 of the National Parks and Access to the Countryside Act, 1949, the council of every county in England and Wales were required to carry out a survey of all lands in their area over which a public path was alleged to subsist and to prepare a draft map of their area showing such footpath whenever in their opinion such a right of way subsisted or was reasonably alleged to have subsisted at the relevant date as therein defined. The council were then required to publish in the prescribed manner a notice of the preparation of the draft map and of the places where it might be seen and to hear objections as to anything contained in or omitted from it. Having made a determination on any such objection, the council were next required to make a provisional map incorporating its determination and to advertise the preparation thereof and the places at which it might be inspected. At any time within 28 days of the publication of such notice the owner, lessee or occupier of any land on which the map showed a public path or a road used as a public path might apply to quarter sessions for a declaration that at the relevant date there was no public right of way over the land, and unless quarter sessions were satisfied that at that date such a right of way did exist they must make a declaration accordingly. By section 31 (7) of the Act provision was made for an appeal to the High Court by way of case stated on a point of law.

Pursuant to their obligations under that Act the respondents, the Westmorland County Council, prepared a provisional map of the borough of Kendal and showed on it a footpath numbered 29 which crossed certain lines of railway owned and occupied by the appellants by means of an overbridge, to be presently described. The relevant date for the purpose of the Act was August 1, 1952.

On November 12, 1954, the appellants applied to the justices of the county of Westmorland sitting as an appeals committee of quarter sessions for the county for a declaration that on November 1 no public right of way existed over the overbridge. That application was heard on April 5, 1955, and was refused, and in due course a case was, pursuant to the Act, stated for the opinion of the High Court.

After reference to the application the case proceeded as follows:

"(A) The said lines of railway were constructed in or about the "year 1847 by the appellants' predecessors in title under powers "contained in the Kendal and Windermere Railway Act, 1845.

"(B) At the date of the construction of the said railway no "public right of way existed on or near to the line of the said "way numbered 29.

"(C) The said bridge was constructed by the appellants' "predecessors in title at or about the time of the construction "of the said railway in order to facilitate access between the land "on either side of the said railway which was severed by the "construction of the same.

"(D) The said bridge was constructed solely as a private "accommodation crossing for the benefit of the owners and "occupiers of the lands so severed as aforesaid and no express "dedication to the public of the way thereover has at any time "been made.

"(E) Since the construction of the said railway members of "the public have used the said way numbered 29 and the said "bridge in such manner and for such period as to give rise to a "presumption that the same had been dedicated as a highway if "the owner of the soil were capable of such dedication.

"(F) The owners from time to time of the soil of the said "way, other than the appellants and their predecessors in title "as owners of the said railway, have at no time been under such "a disability as would render them incapable of dedicating the "said way as a highway and have made no application to quarter "sessions for such a declaration as was sought by the appellants "in these proceedings nor has such an application been made by "any lessee or occupier (other than the appellants) of the soil of "the said way.

"(G) If and when the appellants cease to be bound to maintain the said bridge for the benefit and convenience of the "owners or occupiers of the lands severed by the said railway "for whose benefit and convenience the same was originally "constructed by reason of the rights of the said owners and "occupiers having been released by agreement or abandoned or "having otherwise ceased to be exercisable, the appellants would "demolish and discontinue the said bridge, it being their practice "so to deal with accommodation works as opportunity arises.

"(H) There is no likelihood of the appellants wishing to "construct additional lines of rails under the said bridge or its "approaches unless substantial new industrial development takes "place in the area served by the said railway. There is no "prospect of any such development.

"(I) The continued existence of the bridge will not cause "any danger to the running of the appellants' trains and the "operation of the railway.

"(J) The bridge is a strong and durable edifice likely to last "indefinitely with comparatively small repairs. The cost of "demolishing it would be at the very least £700. It has not "been repaired for at least eight years and if it is to remain it "will require repairs within the next two or three years which "we estimate will cost £250 and thereafter maintenance at a "cost which we estimate at £150 in every period of ten years. "Accordingly we find that the annual cost of maintenance "capitalised would be appreciably less than the cost of "demolition. In every case the costs referred to are calculated "at present day prices.

"(K) In so far as it is a matter of fact, the expenditure "involved in the maintenance of the bridge is quite compatible "with the present and future execution of the purposes for "which the land is vested in the appellants."

The Kendal and Windermere Railway Act, 1845, incorporated (inter alia) the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845. Section 68 of the latter Act required the railway company to make and at all times thereafter maintain for the accommodation of the owners and occupiers of lands adjoining the railway (inter alia) so many bridges over the railway as might be necessary for the purpose of making good any interruptions caused by the railway to the lands through which it was made. The bridge over which the footpath numbered 29 ran (which has been called "the over-"bridge") was constructed pursuant to this section.

Section 16 of the same Act provided that, subject as therein mentioned, it should be lawful for the company for the purpose of constructing the railway or the accommodation works connected therewith as thereinafter mentioned to execute any of the works therein mentioned, that was to say, they might construct upon, across, under, or over any lands described in the plans such embankments, bridges and fences as they should think proper and (this was the relevant power) they might "from time to time "alter, repair, or discontinue the beforementioned works or any "of them, and substitute others in their stead" and further they might "do all other acts necessary for making, maintaining, "altering, or repairing, and using the railway."

Those being the facts, the contentions of the parties were as follows:

"It was contended by the appellants that the dedication of "a public right of way over the said bridge would be incom-"patible with the purposes of the appellants' railway under-"taking in that:

"(A) It would commit the appellants in perpetuity to all "such expense in the maintenance of the said bridge as might "from time to time be necessary which expense could be avoided "if the same were demolished.

"(B) It would fetter the appellants' powers to expand their "said railway undertaking by the construction of additional lines "of rails if and when they might require to do so.

"(C) It would deprive the appellants of their statutory "powers to discontinue the said bridge and crossing pursuant to "section 16 of the Railways Clauses Consolidation Act, 1845.

"It was contended by the respondents that:

"(A) There having been user of the said way numbered 29 "and the said bridge in such manner and for such period as to "give rise to a presumption that the same had been dedicated "as a highway if the owner of the soil were capable of dedication, "dedication ought to be presumed to have taken place;

"(B) the user of the bridge by the public as a public foot-"path was not inconsistent with the operation of the railway "and the execution of the purposes for which the bridge and "adjoining railway land is and was vested in the appellants and "their predecessors;

"(C) the dedication of a public right of way over the bridge "would only be incompatible with the execution of the functions "of the appellants and their predecessors if it were to involve "the appellants in a material increase in expenditure and on the "facts the appellants would not be involved in any increase in "expenditure whatever;

"(D) section 16 of the Railways Clauses Consolidation Act, "1845, does not have the effect contended for it by the appellants; otherwise its effect would be that railway undertakers "as a matter of law could in no circumstances dedicate a right "of way across any part of the railway; this proposition is not "supported in any decided case."

Upon those facts and contentions the justices were of opinion that there had been dedication and accordingly refused to make the declaration sought by the appellants. The question they submitted for the opinion of the High Court was "whether, "on the facts aforesaid, a dedication of the alleged public right "of way was incompatible with the statutory objects of the "appellants." The Divisional Court and Court of Appeal in turn dismissed the appellants' appeal. In effect both courts answered the question submitted to them in the negative.

Sir Andrew Clark Q.C., *Sir Frank Soskice Q.C.* and *John Widgery* for the appellants. Five initial points are important: (1) The bridge is on land acquired for constructing the railway. The railway passes under the bridge and so this is not surplus land. (2) Before the construction of the bridge no public right of way existed at or near the place where it was constructed. (3) The bridge was constructed purely as a private accommodation bridge. (4) It cannot be found that at no time will conditions arise which will require the widening of the railway. (5) In the future the bridge might interfere with the running of the trains; one cannot tell what scientific developments may occur at a later stage.

The bridge was constructed under the powers of section 16 of the Railways Clauses Consolidation Act, 1845, incorporated in the Kendal and Windermere Railway Act, 1845, by section 1 of that Act. There is a difference between statutory powers and the mere powers of a landowner. If there is no right of way, the appellants can pull down the bridge simply as landowners. If there is a right of way, they can only do so by virtue of statutory powers.

The following submissions are made:

(1) The appellants and their predecessors always had express statutory power to discontinue works and to remove the bridge (see section 16 of the Railways Clauses Act). It cannot be assumed that it will never be necessary for them to exercise that power for the purpose of using the railway.

(2) Such a statutory power is a fiduciary power entrusted to the appellants for the benefit of the public and cannot be abandoned by any voluntary act on their part (a) because of the fiduciary nature of the benefit to the public, and (b) because to abandon it would amount to the amendment of an Act of Parliament, which can only be effected by the legislature.

(3) Such a statutory power as the power to remove a bridge is not necessary, in normal circumstances, to enable a statutory company to remove a bridge or any other erection on its own land. It can do that in its own right as landowner. But statutory powers are necessary to enable the company to remove the bridge if removal would infringe the rights of third parties or of the public. The power in the Act must therefore be deemed to have been inserted for the express purpose of enabling the company to remove a bridge which it could not otherwise have removed because the public or some third person had acquired rights over it.

(4) Alternatively, if a statutory corporation can abandon a statutory power, it can only do so where the power is itself subsidiary and where its abandonment could never interfere with the carrying out of its statutory purposes to the best advantage.

(5) The mere fact that, as circumstances indicated at the time when the abandonment of the power came into question, there was no evidence to show that its abandonment would in fact interfere with the corporation's statutory purposes, is not enough to justify the abandonment of the power. It must be shown that it is inconceivable that at any future date, however remote, any such interference could arise.

(6) It follows, therefore, that in the present case the railway company had no power to dedicate to the public a right of way over the bridge in question greater than a right limited to last only till such time as the railway company should find it necessary to remove the bridge in exercise of its statutory powers.

(7) But it is the essence of a public right of way that it must be dedicated in perpetuity, and in English law there can be no dedication of a way to the public for a limited time, certain or uncertain.

The obligation on a railway company to provide an accommodation way when its lines sever a landowner's property remains in force only while the property on each side of the railway remains in common ownership, and there is no obligation to keep open the accommodation bridges when the obligation to the landowner comes to an end: *Midland Railway Co.* v. *Gribble.*[1] The effect of dedicating a right of way over an accommodation bridge would be to prevent the exercise of the power to discontinue the bridge, and that would amount to the abandonment or modification of the statutory power. It is conceded that the mere convenience of two adjoining landowners in visiting each other would be sufficient ground for the maintenance of an accommodation bridge.

It is of the essence of a public right of way that it is perpetual. The dedication can be limited as to the type of user, its quality, but it cannot be subject to a limitation totally extinguishing its user at a subsequent time: see *Dawes* v. *Hawkins*,[2] approved in *Corsellis* v. *London County Council*[3]; see also Carson's Real Property Statutes, 3rd ed., p. 65, citing *Fitzpatrick* v. *Robinson.*[4] The powers conferred on statutory corporations are conferred for the benefit of the public. As to such powers as these, see *Duke of Bedford* v. *Dawson*[5] and *Emsley* v. *North Eastern Railway Co.*[6]

Rex v. *Inhabitants of Leake*[7] is not inconsistent with the appellants' case. The facts are different here. Further, the conclusions of fact of the majority in that case were not justified. It has no application to a case like the present where dedication would involve the voluntary release or abandonment or modification of a power conferred by a special Act on a statutory undertaker, or by an Act relating to the way in which land acquired for the purposes of the Act may be dealt with: see section 16 of the Act of 1845. It did not lay down as the test of incompatibility whether or not there was any likelihood of the dedication of a right of way materially hindering the statutory undertaker in the efficient and adequate discharge of his duty. The test which it did lay down was whether or not the grant of such an easement might in any possible circumstances in the future hamper the undertaker in carrying out the purposes of his special Act to the best advantage: see *per* Parke J.[8] in his use of the word "never."

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[1] [1895] 2 Ch. 827, 829 et seq.

[2] (1860) 8 C.B.N.S. 848.

[3] [1907] 1 Ch. 704; 23 T.L.R. 366.

[4] (1828) 1 H. & B. 585.

[5] (1875) L.R. 20 Eq. 353.

[6] [1896] 1 Ch. 418, 428–429, 432, 434; 12 T.L.R. 219.

[7] (1833) 5 B. & Ad. 469, 477–481, 483.

H. L. (E.)

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BRITISH TRANSPORT COMMISSION *v.* WESTMORLAND COUNTY COUNCIL. SAME *v.* WORCESTERSHIRE COUNTY COUNCIL.

Grand Surrey Canal Co. v. *Hall*[9] is against the appellants. The passage based on it and on *North London Railway Co.* v. *Vestry of St. Mary, Islington,*[10] a case of the same sort, in Pratt and Mackenzie's Law of Highways, 19th ed., p. 21, is inaccurate. *Mulliner* v. *Midland Railway Co.*[11] supports the appellants' propositions. There the arch was in fact required by the railway for the purpose of storage.

The test is not the position at the time of the alleged dedication. One must ask whether it is remotely possible that in the future the dedication might interfere with the purposes of the railway, and, if it is even remotely possible, there can be no dedication. *Paterson* v. *Provost, etc., of St. Andrews*[12] supports the appellants on this point and applies directly to this case. See also *Ayr Harbour Trustees* v. *Oswald,*[13] which is decisive in the appellants' favour. *Grand Junction Canal Co.* v. *Petty*[14] tends the other way, but has no bearing on the point under section 16 of the Act of 1845. In *In re an Arbitration between Gonty and Manchester, Sheffield and Lincolnshire Railway Co.*[15] no question of dedication in fact arose. *Caledonian Railway Co.* v. *Turcan & Co.*[16] carries the matter no further. See also *Great Western Railway Co.* v. *Solihull Rural District Council.*[17]

From the cases it appears that the right questions to put to a jury in such a case as this would be: (1) Does the user of the right of way interfere with the proper running of the railway? (2) If no, so far as you can foresee, is there any possibility of the continued user of the right of way interfering with the proper running of the railway? (3) Would the inability to remove the bridge be likely to interfere with the proper running of the railway? (4) If no, do the facts show that the inability to remove the bridge could never at any time interfere with the running of the railway? Where there is such a provision as that of section 16 of the Act of 1845 it could never be found that the inability to remove the bridge could never interfere with the proper running of the railway.

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[8] 5 B. & Ad. 469, 481.

[9] (1840) 1 Man. & G. 392.

[10] (1872) 27 L.T. 672.

[11] (1879) 11 Ch.D. 611, 619, 623.

[12] (1881) 6 App.Cas. 833, 843, 846–847, 851.

[13] (1883) 8 App.Cas. 623, 634, 635, 636, 637, 640.

[14] (1888) 21 Q.B.D. 273; 4 T.L.R. 502.

[15] [1896] 2 Q.B. 439; 12 T.L.R. 617.

[16] (1898) 25 R.(H.L.) 7, 16.

[17] (1902) 86 L.T. 852; 18 T.L.R. 707.

Attorney-General ex rel. Barnes Urban District Council v. *London and South Western Railway Co.*[18] was not a question of dedication. *Taff Vale Railway Co.* v. *Pontypridd Urban District Council*[19] is directly in point when read with the *Ayr Harbour* case.[20] One cannot divest oneself of a statutory power.

Lancashire and Yorkshire Railway v. *Davenport*[21] is not relied on, because it has no bearing on the point under section 16. *In re South Eastern Railway Co. and Whiffin's Contract*[22] is a case the other way. But that case was criticized in *Stourcliffe Estates Co. Ltd.* v. *Bournemouth Corporation.*[23] *South Eastern Railway Co.* v. *Warr*[24] does not help the decision of the present problem, nor does *South Eastern Railway Co.* v. *Cooper.*[25] *Birkdale Electric Supply Co. Ltd.* v. *Southport Corporation*[26] is useful for the speech of Lord Sumner reviewing the authorities. See also *In re Heywood's Conveyance.*[27]

The cases support the following propositions: (1) A statutory undertaker cannot voluntarily release or abandon any statutory power conferred on it by its special Act of Parliament relating to the manner in which that statutory undertaker may deal with the land acquired for the purposes of the Act. (2) A statutory undertaker cannot, in the absence of express statutory power, grant any easement over land acquired for the purposes of its special Act if its existence might in any possible circumstances at any future time hamper the undertaker in carrying out to the best advantage the purposes of the special Act: the *Ayr Harbour* case,[28] *Paterson's* case[29]; the *Birkdale* case,[30] *per* Lord Sumner; the *Taff Vale* case[31]; *In re South Eastern Railway Co. and Whiffin's Contract,*[32] and *In re Heywood's Conveyance.*[33] Not one actual decision directly conflicts with either proposition, though some dicta have cast doubt on the second proposition. The Court of Appeal were wrong in holding themselves bound by *South Eastern Railway Co.* v. *Warr.*[34]

As to what Singleton L.J. said in the Court of Appeal[35] about the Rights of Way Act, 1932, that Act has not so altered the law as to bind the House to find against the appellants: see *Jones* v.

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[18] (1905) 69 J.P. 110; 21 T.L.R. 220.

[19] (1905) 93 L.T. 126.

[20] 8 App.Cas. 623.

[21] (1906) 4 L.G.R. 425.

[22] [1907] 2 Ch. 366.

[23] [1910] 2 Ch. 12; 26 T.L.R. 450.

[24] (1923) 21 L.G.R. 669.

[25] [1924] 1 Ch. 211.

[26] [1926] A.C. 355; 42 T.L.R. 303.

[27] [1938] 2 All E.R. 230.

[28] 8 App.Cas. 623.

[29] 6 App.Cas. 833.

[30] [1926] A.C. 355.

[31] 93 L.T. 126.

[32] [1907] 2 Ch. 366.

[33] [1938] 2 All E.R. 230.

[34] 21 L.G.R. 669.

[35] [1956] 2 Q.B. 214, 247–248; [1956] 2 All E.R. 129.

Bates.[36] Nothing in the Act is inconsistent with the appellants' submissions.

Michael Rowe Q.C., Harold Williams Q.C. and *E. S. Temple* for the respondents. The appellants and their predecessors in title were at all material times capable of dedicating such footpaths as these as rights of way. To say that a statutory body is incapable of granting a right of way or an easement, expressly or impliedly, would reverse the law accepted for over a century. Thus, canal towing-paths have been accepted as rights of way. See also *Hunwick* v. *Essex Rivers Catchment Board.*[37]

The general rule as to the limits of the powers of statutory corporations is properly expressed in *Rex* v. *Inhabitants of Leake.*[38] It is not inconsistent with either *Paterson's* case[39] or the *Ayr Harbour* case.[40] Apart from their primary purpose, statutory provisions are not obligatory. Thus, unless a railway company's power to run railway trains is in fact carried out, its fundamental purpose is not being carried out, for the company is bound to run them. The principle in *Leake's* case[41] has been applied in at least 10 cases since the *Ayr Harbour* case.[42] If the appellants are right, *Leake's* case[43] must have been wrongly decided. When Parke J. used the word " never " in that case,[44] he meant " never, so far as anyone can foresee." The 10 cases referred to are: *Grand Junction Canal Co.* v. *Petty*[45]; *Foster* v. *London, Chatham and Dover Railway Co.*[46]; *Dundee Harbour Trustees* v. *Nicol*[47] (a postscript to the previous case, not reckoned in the 10); *In re an Arbitration between Gonty and Manchester, Sheffield and Lincolnshire Railway Co.*[48]; *Great Western Railway Co.* v. *Solihull Rural District Council*[49]; *Attorney-General ex rel. Barnes Urban District Council* v. *London and South Western Railway Co.*[50]; *Taff Vale Railway Co.* v. *Pontypridd Urban District Council*[51]; *Lancashire and Yorkshire Railway* v. *Davenport*[52]; *Great Central Railway Co.* v. *Balby-with-Hexthorpe Urban District Council*[53]; *South Eastern Railway Co.* v. *Warr*[54] and *South Eastern Railway Co.* v. *Cooper.*[55] See also *Magistrates*

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[36] (1938) 158 L.T. 507, 510–511; 54 T.L.R. 649; [1938] 2 All E.R. 237.
[37] [1952] 1 All E.R. 765; 116 J.P. 217.
[38] 5 B. & Ad. 469.
[39] 6 App.Cas. 833.
[40] 8 App.Cas. 623.
[41] 5 B. & Ad. 469.
[42] 8 App.Cas. 623.
[43] 5 B. & Ad. 469.
[44] Ibid. 481.
[45] 21 Q.B.D. 273.
[46] [1895] 1 Q.B. 711; 11 T.L.R. 89.
[47] [1915] A.C. 550; 31 T.L.R. 118.
[48] [1896] 2 Q.B. 439.
[49] 86 L.T. 852.
[50] 69 J.P. 110.
[51] 93 L.T. 126.
[52] 4 L.G.R. 425.
[53] [1912] 2 Ch. 110; 28 T.L.R. 268.
[54] 21 L.G.R. 669.
[55] [1924] 1 Ch. 211.

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of Edinburgh v. *North British Railway Co.*[56] and *Reigate Corporation* v. *Surrey County Council.*[57]

As to the question of expense raised in the appellants' contention (A) in the case stated, admittedly according to *Great Western Railway Co.* v. *Solihull Rural District Council*[58] and *Lancashire and Yorkshire Railway* v. *Davenport*[59] if the maintenance of a work like this bridge is likely to cast an extra burden of finance on the undertaker, that is relevant to the question of the compatibility or incompatibility of the dedication with the undertaker's statutory purposes. But compatibility is a question of fact: see *Great Central Railway Co.* v. *Balby-with-Hexthorpe Urban District Council*[60] and *South Eastern Railway Co.* v. *Warr.*[61] Here expense would not produce incompatibility.

From the *Ayr Harbour* case[62] to the *Birkdale* case[63] the principle in *Leake's* case[64] was consistently applied. In the *Birkdale* case[65] the Earl of Birkenhead clearly stated the rule as being that of compatibility or incompatibility.

In certain cases incompatibility is so obvious that it speaks for itself. As to the test of incompatibility, the correct approach is to consider what duties the public statutory corporation was established to perform and then consider whether the action in question would materially hinder the corporation from an adequate and efficient discharge of those duties. The duty of a railway to the public is to run its trains safely and efficiently. The test here is whether, at the date when the question is considered by the tribunal of fact, there was any likelihood that the existence of the alleged right of way would interfere with the adequate and efficient discharge of the undertaker's statutory duties. Here the right of way is not inconsistent with the appellants doing their duty as railway undertakers, nor is it likely to be so in the future. In considering the future, one must take into account the likelihood of the land being wanted for railway works and the likelihood of expense being incurred.

As to the question of the grant of a right of way over the bridge being inconsistent with the express statutory powers conferred by section 16 of the Act of 1845, it does not confer on the railway undertakers a mere right of discontinuance; the express power is to discontinue and substitute another work. In the exercise of the power of any other landowner the appellants could discontinue the bridge without substituting another provided that they disturbed no legal rights. But section 16 gives the railway undertakers a power which qua landlords they would not have, a power to discontinue the bridge against the will of the persons entitled to the accommodation way, paying, if necessary, compensation under the relevant provisions of the Act. Since the appellants now claim a power of discontinuance without substitution, section 16 is not in point:

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[56] (1904) 6 F. 620.

[57] [1928] Ch. 359; 44 T.L.R. 308.

[58] 86 L.T. 852.

[59] 4 L.G.R. 425.

[60] [1912] 2 Ch. 110.

[61] 21 L.G.R. 669.

[62] 8 App.Cas. 623.

[63] [1926] A.C. 355.

[64] 5 B. & Ad. 469.

[65] [1926] A.C. 355, 364.

Further, the power in section 16 is ancillary to the power to make, alter, repair or use the railway: *Emsley* v. *North Eastern Railway Co.*[66] and *Pugh* v. *Golden Valley Railway Co.*[67] It would be incredible that the existence of such a power should prevent dedication of a right of way where, as here, the dedication was not incompatible with the main purposes of the railway. The test of compatibility or incompatibility applied to the main power governs a subsidiary power.

As to the effect of a long series of cases on the interpretation of a statute, see Maxwell on the Interpretation of Statutes, 10th ed., pp. 308–309, and *Morgan* v. *Crawshay.*[68] Section 1 of the Rights of Way Act, 1932, has recognized the validity of the doctrine in *Leake's* case.[69] To annul the long line of cases following it would have serious effects.

When this bridge ceased to be an accommodation bridge, the obligation to maintain it would fall on the local authority.

Harold Williams Q.C. following. In the matter of dedication, there is a relationship between the right of passage and the powers of the undertaker. If a public right of way is established on the bank of a river or canal or over a railway, the way is considered to be dedicated to the public, subject to the statutory rights of the undertakers: see *Grand Junction Canal Co.* v. *Petty*[70] and *Attorney-General ex rel. Barnes Urban District Council* v. *London and South Western Railway Co.*[71] If the railway undertakers wanted to remove this bridge by virtue of their statutory rights, that would override the common law right of passage. That might result in a right of way over the line instead of over the bridge. This argument is not concerned with the question of the liability to maintain the bridge but with the existence of the right of way. Paths are known to go over a

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[66] [1896] 1 Ch. 418; 12 T.L.R. 219.
[67] (1880) 15 Ch.D. 330.
[68] (1871) L.R. 5 H.L. 304.
[69] 5 B. & Ad. 469.
[70] 21 Q.B.D. 273, 275–276.
[71] 69 J.P. 110, 111.

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railway track, and many of them existed before the railway or they may exist by express dedication.

The law of Scotland as regards the creation of rights of way is different from that of England: see *Mann* v. *Brodie*.[72] The fiction of dedication does not exist in Scotland. Scottish cases are not a safe guide on the creation of a highway.

Sir Andrew Clark Q.C. in reply. The matter really comes back to *Leake's* case.[73] No other case cited by the respondents is a direct authority. That case establishes that statutory undertakers cannot dedicate a public right of way if in any way it may interfere with the performance of their statutory purposes. The question to be asked is whether the existence of the alleged right of way might, in any possible circumstances, at any future time, hamper the undertakers in carrying out to the best advantage the purposes of their special Act. The whole matter turns on the ratio decidendi of *Leake's* case,[73] what it decided, whether it was rightly decided and whether it has been overruled. It is a difficult case to understand, but what it laid down was not the principle for which the respondents contend. Parke J. held that the court was entitled to infer from the facts that the existence of the right of way could never interfere with the statutory purposes of the drainage Act, that the bank in question was not required for the works, i.e., that it was surplus land, that the road would be of advantage to the drainage works and that the benefit resulting from it might be as great as any pecuniary consideration which might be obtained from a sale. Lord Denman C.J. held that he could not infer that the right of way would necessarily interfere with the statutory purposes, that the existence of good roads was desirable from the point of view of the maintenance of the drains and so that the making of the road was within the express powers of the Act, since the cheapest way of getting good roads was to dedicate them to the public. His judgment does not touch the present problem. The only principle to be deduced from *Leake's* case [73] is that it is not within the powers of statutory undertakers to dedicate a public right of way unless it can be established that the right will never interfere with the carrying out of their statutory powers and that the dedication is not wholly gratuitous. If that is right, then it is in complete accord with the *Ayr Harbour* case.[74] If *Leake's* case [75] purported to lay down a wider principle, then that is wrong and it cannot stand, because it is contrary to *Paterson's* case,[76] the *Ayr Harbour* case [77] and the *Birkdale* case,[78] decisions of the House of Lords, and it is not too late to overrule it: see *Caledonian Railway Co.* v. *Turcan.*[79] See also section 23 of the Highway Act, 1935, and *Robinson* v. *Richmond (Surrey) Borough Council.*[80]

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[72] (1885) 10 App.Cas. 378, 385–386.

[73] 5 B. & Ad. 469.

[74] 8 App.Cas. 623.

[75] 5 B. & Ad. 469.

The Rights of Way Act, 1932, was not intended to alter the substantive law, only the law of evidence. The point as to the meaning of incompatible remains open.

The appellants' contention (A) in the case stated is not now advanced as a separate contention.

Their Lordships took time for consideration.

May 14. VISCOUNT SIMONDS. My Lords, these consolidated appeals, in which the British Transport Commission are appellants and the Westmorland County Council and the Worcestershire County Council respectively are respondents, raise a question of general importance. It will be sufficient to state the facts and contentions in regard to the appeal in which the Westmorland County Council are respondents. The same conclusion must be reached in both cases.

[His Lordship stated the facts and continued:] I must for a moment recur to the appellants' contentions as they appear in the case stated. Contention (A) is no longer advanced as a separate contention. Contentions (B) and (C) may fairly be said to be directed to the general question submitted by the justices, but learned counsel for the appellants found it convenient to argue the case upon the alternative pleas: (*a*) that the dedication of public rights of way in the circumstances of the case would amount to a repeal of the appellants' statutory power to discontinue the bridge in certain events and would thus be ultra vires; and (*b*) that such dedication would have been incompatible with the public or statutory purposes for which the appellants and their predecessors held their lands. It is, however, clear that the two pleas interlock: for one aspect of incompatibility might consist in such a surrender of power as to debar the performance of the statutory purpose. I propose, therefore, to examine the case upon the footing that the real question is that which was submitted by the justices, not, however, closing my mind to the aspect of the question to which I have just referred.

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[76] 6 App.Cas. 833.

[77] 8 App.Cas. 623.

[78] [1926] A.C. 355.

[79] [1898] A.C. 256, 266-267.

[80] [1955] 1 Q.B. 401; [1955] 1 All E.R. 321.

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Viscount Simonds.

Before I refer to the authorities, which are numerous, it is perhaps desirable to state that, in my opinion, they are by no means irreconcilable, as has been suggested, but that the single difficulty is to ascertain from them what is the test of incompatibility which is to guide the court in determining whether an act proposed to be done by a railway or other statutory company is incompatible with the statutory purpose for which it was authorized to acquire and acquired its land.

Any examination of this question must begin with the case of *Rex* v. *Inhabitants of Leake*,[1] which has been cited in many cases, some of them in this House, and never disapproved. The decision goes to the root of the matter, and, often as they have been cited, I think I should remind your Lordships of the words of Parke J. in that case. "If," he said, "the land were vested "by the Act of Parliament in commissioners, so that they were "thereby bound to use it for a special purpose, incompatible with "its public use as a highway, I should have thought that such "trustees would have been incapable in point of law to make a "dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think "it clear that the commissioners have that power."

Here a principle is laid down which is supported not only by a great weight of succeeding authority but by its inherent reasonableness. For, though, on the one hand, it would be improper that commissioners or other persons having acquired land for a particular statutory purpose should preclude themselves from using it for that purpose, on the other hand, if consistently with its user for that purpose, it can be used for some other purpose also, I see no impropriety in such secondary user. If the usefulness of a parcel of land is not exhausted by its user for its statutory purpose, why should it not be used for some other purpose not incompatible with that purpose?

This, at least, is the view which has been consistently taken for over 100 years, and I do not doubt that any departure from it would be fraught with most serious consequences to assumedly well-established public rights. Amongst the cases to which reference might be made some have a particular value because they were later in date than the case of *Ayr Harbour Trustees* v. *Oswald*,[2] upon which the appellants strongly relied, and were decided in the light of that binding decision. I may mention such cases as *Grand Junction Canal Co.* v. *Petty*[3]; *Foster* v.

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[1] (1833) 5 B. & Ad. 469, 478.

[2] (1883) 8 App.Cas. 623.

[3] (1888) 21 Q.B.D. 273; 4 T.L.R. 502.

London, Chatham and Dover Railway Co.[4]; *In re an Arbitration between Gonty and Manchester, Sheffield and Lincolnshire Railway Co.*[5]; *Taff Vale Railway Co.* v. *Pontypridd Urban District Council*[6]; *South Eastern Railway Co.* v. *Cooper*[7]; *Birkdale District Electric Supply Co. Ltd.* v. *Southport Corporation.*[8] If in the case of *Mulliner* v. *Midland Railway Co.*[9] there are to be found observations by Sir George Jessel which do not conform with this long line of authority, they cannot be given the weight which is usually accorded to the decisions of that very learned judge. They have in fact been the subject of judicial criticism and explanation: see, e.g., *Gonty's* case[10] and *Petty's* case.[11]

It was, however, upon the *Ayr Harbour* case[12] that counsel for the appellants mainly relied, suggesting, if I understood the argument, that a proper understanding of that case must lead to a decision in his favour. I think, on the contrary, that this contention is based on a radical misunderstanding of it. For it appears to me that in the *Ayr Harbour* case[12] it was plain that the proposed agreement by the statutory body, which had acquired land for a particular purpose, that they would not use it so as to interfere with the access from other property of the vendor to the sea, was regarded as incompatible with the statutory purpose. It was in fact an example of incompatibility, not a decision to the effect that incompatibility does not supply a test. This was clearly the view of Lord Sumner in the *Birkdale* case.[13] Similar observations may be made on the case of *Paterson* v. *Provost, etc., of St. Andrews,*[14] which gives equally little support to the appellants.

If I am right in saying that the principle of *Leake's* case[15] must be applied here, I must next consider what is the test of incompatibility, which, as I have already said, appears to me to be the real difficulty in the case. This is a question of fact. It can be nothing else and it has been so treated, and expressly so treated, in many of the cases to which I have referred. But to say this does not completely solve the problem. For the jury or tribunal of fact must still be properly directed what is the test, and it is to this point that counsel for the appellants directed his attack. He urged that there could only be incompatibility, or, perhaps I should here say, compatibility, if it could be proved that in no conceivable circumstances could the proposed user at any future time and in any way possibly interfere with the statutory purpose for which the land was acquired. If he is right, it is clear that the justices in the present case did not ask themselves the right question or ascertain the relevant facts.

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[4] [1895] 1 Q.B. 711; 11 T.L.R. 89.
[5] [1896] 2 Q.B. 439; 12 T.L.R. 617.
[6] (1905) 93 L.T. 126.
[7] [1924] 1 Ch. 211.
[8] [1926] A.C. 355; 42 T.L.R. 303.
[9] (1879) 11 Ch.D. 611.
[10] [1896] 2 Q.B. 439.
[11] 21 Q.B.D. 273.
[12] 8 App.Cas. 623.
[13] [1926] A.C. 355.
[14] (1881) 6 App.Cas. 833.
[15] 5 B. & Ad. 469.

My Lords, I am satisfied that this argument is misconceived. In the first place, in none of the relevant cases, neither in those that I have already mentioned nor in those, far more numerous, that I have examined, has anything of the kind been suggested. Parke J.'s use of the word "never" in *Leake's* case[16] was clearly not intended to have so dramatic an effect. But in the second place, to give to incompatibility such an extended meaning is in effect to reduce the principle to a nullity. For a jury, invited to say that in no conceivable circumstances and at no distance of time could an event possibly happen, could only fold their hands and reply that it was not for them to prophesy what an inscrutable Providence might in all the years to come disclose. I do not disguise from myself that it is difficult to formulate with precision what direction should be given to a jury. But, after all, we live in a world in which our actions are constantly guided by a consideration of reasonable probabilities of risks that can reasonably be foreseen and guarded against, and by a disregard of events of which, even if we think of them as possible, we can fairly say that they are not at all likely to happen. And it is, in my opinion, by such considerations as these, imprecise though they may be, that a tribunal of fact must be guided in determining whether a proposed user of land will interfere with the statutory purpose for which it was acquired. At an earlier stage of this opinion I set out at length the facts found by the justices in order that it might be seen how far they had correctly directed themselves in reaching their conclusion that there had been a dedication of the way in question. In paragraph 2 (H), (I), (J) and (K) of the stated case they find the facts as they are now and as they are, in their view, likely to be. I do not think that there is any sin of commission or omission to be found in them or that it can be said that upon the basis that I have attempted to lay down they were not well entitled to reach their conclusion.

I should upon this part of the case add that there was some discussion whether a tribunal of fact must look at the facts as they are at the date when the matter arises for determination or, disregarding the present, try to look at them as they existed when the dedication was presumed to be made. It is possible, my Lords, that a case may arise in which it becomes relevant to decide this question, but inasmuch as a presumption of dedication arises after user for a number of years but there is no presumption of the date of dedication and in the present case the justices adopted the course most favourable to the appellants by looking at the facts as they are today and can today reasonably be foreseen, I do not think it necessary to say any more on this question.

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[16] 5 B. & Ad. 469, 481.

My Lords, I come now to that part of the argument for the appellants, which, though it is comprehended in the broad question of incompatibility, was treated as an independent plea. It was to the effect that in the circumstances of the present case the dedication of a right of way over the overbridge in question would amount to a repeal of the appellants' statutory power to discontinue the bridge and would thus be ultra vires. This plea looks back to section 16 of the Railways Clauses Consolidation Act to which I have already referred, and it is stated in a way which gives it a superficial attraction. But it is not accurate to say that, if a statutory body puts it out of its power to act in an authorized manner in a particular case, that amounts to a repeal pro tanto of the Act of Parliament. This appears to me to be involved in the larger conclusion that I have already reached that land acquired for a particular statutory purpose may yet be used for another purpose which is not incompatible with it. The argument here, too, could be that user for another purpose precludes user for the statutory purpose and therefore pro tanto amounts to a repeal of the Act. But such an argument is rejected because the statutory purpose is not defeated so long as the secondary user is compatible with it. A fortiori, where the question is not of the main purpose of the undertaking but of the exercise of a power under section 16, the question is whether its non-exercise, or such an act as will preclude its exercise, is consistent with the statutory purpose for which the land was acquired. The answer must be precisely that which has already been given. It is consistent: it is not incompatible. The single new fact which might in some other case be of importance is that the continued existence of a bridge, which the appellants would in other circumstances demolish, might involve them in certain costs of maintenance. But in the present case it was disclaimed as a separate ground of incompatibility and I have been unable to discern its relevance in any other way. Nor do I think it necessary to consider what may be the respective obligations of the appellants and the local authority in the event of the bridge being no longer required as an accommodation work but being still necessary to support the public way. This is a question which has not arisen and may never arise.

Reference was made in the course of the argument before the House to section 1 of the Rights of Way Act, 1932, subsection (7) of which provides: "Nothing in this section contained shall "affect any incapacity of a corporation or other body or person "in possession of land for public or statutory purposes to dedicate "any such way where such way would be incompatible with "such public or statutory purposes." I agree with Singleton and Hodson L.JJ. that the subsection does not help the appellants but on the contrary, by preserving the existing law and recognizing that incompatibility of a public way with statutory purposes is the test, confirms the view that the principle of *Leake's* case[17] prevails.

For these reasons, which shortly adopt the judgments of the Divisional Court and the Court of Appeal, I am of opinion that both appeals should be dismissed. I cannot conclude without saying how much I have owed in preparing this opinion to the careful and exhaustive judgment of the late Singleton L.J.

LORD MORTON OF HENRYTON. My Lords, I shall deal only with the Westmorland case as that was the only case argued before your Lordships and it is agreed that the same question arises in each of the two consolidated appeals.

The bridge over which the alleged public right of footway runs was constructed by the predecessor in title of the appellant commission solely as a private accommodation crossing for the benefit of the owners or occupiers of lands severed by the construction of the Kendal and Windermere railway. Since the construction of that railway members of the public have used the bridge in such manner and for such period as to give rise to a presumption that the same had been dedicated as a public footpath if the owner of the bridge were capable of such dedication. See finding (E) in paragraph 2 of the case stated.

Sir Andrew Clark, for the appellant commission, submitted that neither the commission nor the railway company which was its predecessor in title was capable of such dedication. His reasons were (1) that a dedication of a public right of way over the bridge would prevent the undertakers from exercising at any time a statutory power, namely, the power to discontinue the bridge, which is conferred by section 16 of the Railways Clauses Consolidation Act, 1845. That Act is incorporated with the special Act, the Kendal and Windermere Railway Act, 1845; (2) that such a dedication might, at some future time, hamper the undertakers in carrying out to the best advantage the purposes of the special Act.

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[17] 5 B. & Ad. 469.

My Lords, in my opinion, the only rule applicable to the present case is that a statutory company has no power to grant a public right of way the enjoyment whereof by the public is incompatible with the statutory objects of the company. This rule was established as a rule of law by a long series of cases, starting with *Rex* v. *Inhabitants of Leake* [17] and has been recognized by this House in *Birkdale District Electric Supply Co. Ltd.* v. *Southport Corporation.*[18]

It is common ground between the parties that the question of incompatibility is a question of fact, but there is a vital difference in the views put forward on behalf of each party as to the proper question to be put to the tribunal of fact. Sir Andrew Clark submitted that the question should be "whether the "existence of the alleged right of way might, in any possible "circumstances, at any future time, hamper the undertaker in "carrying out to the best advantage the purposes of its special "Act." Mr. Rowe, for the respondent council, submitted that the question should be "whether at the date when the question "is considered by the tribunal of fact, there is any likelihood "that the existence of the alleged right of way would interfere "with the adequate and efficient discharge of the undertaker's "statutory duties."

My Lords, I can find no decision, in the long line of authority cited in argument, which is clearly in favour of Sir Andrew Clark's version, and I find several cases in which the court appears to have acted upon the view that Mr. Rowe's version is the right one. As examples I would mention *Grand Junction Canal Co.* v. *Petty* [19] and *In re an Arbitration between Gonty and Manchester, Sheffield and Lincolnshire Railway Co.*[20]

I do not find this result surprising, for if Sir Andrew Clark's version is correct, it would, I think, be impossible ever to presume dedication of a public right of way by a statutory railway company over any part of the land which it had acquired for the purposes of its Act. A right of way is a burden upon the land. I cannot think that it would be possible for a tribunal of fact honestly to find that the existence of such a right could never at any time, and in any possible circumstances, hamper the undertaker; yet there are many cases in which a dedication of a public right of way has been presumed against a statutory railway company.

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[17] 5 B. & Ad. 469.

[18] [1926] A.C. 355.

[19] 21 Q.B.D. 273.

[20] [1896] 2 Q.B. 439.

I therefore accept Mr. Rowe's submission, and turn to consider whether, upon the facts found in the case stated, there is any likelihood that the existence of a public right of way over the bridge would interfere with the adequate and efficient discharge of the commission's statutory duties.

It is first to be borne in mind that the bridge is an accommodation crossing and there is no evidence that it has ceased to be required for the purpose for which it was erected. Indeed, it cannot be said with certainty that a time will ever come when it is no longer required for that purpose, for the land on each side of the line may remain indefinitely in one ownership and there may never be any agreement with the owner that the bridge may be discontinued.

Next, there is, of course, no obligation upon the commission to exercise the power to discontinue the bridge, even if the time comes when it is no longer required for accommodation purposes.

Finally, the findings of fact (H), (I), (J) and (K) in paragraph 2 of the case stated make it clear that it is extremely unlikely that the commission will ever find it necessary to discontinue the bridge for the purposes of its undertaking. I use the word "necessary" because it has been held that each one of the powers conferred by section 16 of the Railways Clauses Consolidation Act, 1845, can be exercised only when it is necessary for making, maintaining, altering or repairing and using the railway: see *Reg.* v. *Wycombe Railway Co.*,[21] approved in *Pugh* v. *Golden Valley Railway Co.*,[22] and *Emsley* v. *North Eastern Railway Co.*[23]

I add that I am by no means satisfied that it would be impossible to discontinue the bridge, either under the statutory power or at common law, if it were no longer required as an accommodation way and if a public right of way existed over it. I find it unnecessary, however, to deal with this question, in view of the findings of fact to which I have just referred.

[21] (1867) L.R. 2 Q.B. 310.

[22] (1880) 15 Ch.D. 330.

[23] [1896] 1 Ch. 418; 12 T.L.R. 219.

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For these reasons, my Lords, I am of opinion that the question which I have posed should be answered in the negative. It follows that I would dismiss the appeals.

LORD RADCLIFFE. My Lords, I agree that these appeals ought to be dismissed. I should not say more but for the fact that the principles of law which bear upon their subject appear to me to stand so curiously related that I do not want to part with the appeals without saying something as to what I conceive to be involved in the decision now proposed. It means, I think, that we must cut down two very far-reaching general propositions of law, valuable in themselves, to proportions that are manageable in relation to the particular set of circumstances with which we are now confronted.

Both these general propositions support the appellants' argument. One proposition is that laid down by Jessel M.R. in *Mulliner* v. *Midland Railway Co.*[24] It is to the effect that a railway company, which operates under statutory powers of managing its railway conferred upon it for the furtherance of the public interest, is devoid of legal capacity to grant any easement or right of way over land acquired by it unless expressly authorized by statute so to do. It has not, generally speaking, the full capacity of disposition enjoyed by a private owner of land. The other proposition, which is distinct from the first, is that no body corporate or unincorporate, which holds property or rights under powers conferred upon it for the public benefit can make a disposition or agreement effective in law by which it abdicates its freedom to exercise those powers at any time in the future. The second proposition rests principally upon two decisions of this House in Scottish cases, *Paterson* v. *Provost, etc., of St. Andrews*,[25] *Ayr Harbour Trustees* v. *Oswald*.[26]

Mulliner's case[27] was decided in 1879. It has been referred to again and again in other cases, both in argument and in judgments of the court. It has certainly never been overruled: on the contrary Sir George Jessel's statement of the law has twice been made the very foundation of unanimous decisions in the Court of Appeal: see *Great Western Railway Co.* v. *Solihull Rural District Council*[28] and *Great Western Railway Co.* v. *Talbot*.[29] More than that, part of his reasoning (though not directly his reasoning on this point) was quoted with approval by Lord Blackburn when making the first speech in this House in the *Ayr Harbour* case.[30] In any ordinary combination of circumstances one would say that the legal principle laid down in *Mulliner's* case [31] was firmly established.

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[24] 11 Ch.D. 611.

[25] 6 App.Cas. 833.

[26] 8 App.Cas. 623.

[27] 11 Ch.D. 611.

[28] (1902) 86 L.T. 852; 18 T.L.R. 707.

[29] [1902] 2 Ch. 759; 18 T.L.R. 775.

On the other hand, it is equally certain that for many years there has been a tendency to treat *Mulliner* [31] as having stated the law in terms different from those actually employed. It has been subjected to a process of judicial explanation. Few authorities can have been explained so often with such little fidelity to the original source. In 1888, in *Grand Junction Canal Co.* v. *Petty*,[32] the court treated *Mulliner* [33] as being a decision in which " the facts of the case . . . pointed to a different con- " clusion of fact from that on which the decision in *Rex* v. " *Inhabitants of Leake* [34] was founded." In *South Eastern Railway Co.* v. *Cooper* [35] Pollock M.R. referred to *Mulliner* [36] as " a case . . . of very special character," and Warrington L.J., in the same case, similarly discounts the significance of Sir George Jessel's intended proposition of law by describing it [37] as made " in reference to the facts of that case." That, I suppose, could be said with as much or as little force about all judgments. Yet two things at least are plain from a reading of *Mulliner* [38]: first, that there was nothing special about the facts—they related to a purported grant of a right of way through arches forming the substructure of a station—and, secondly, that Sir George Jessel rested his decision upon what he himself called the " general " law." The question that he put and answered in the negative was: " Has a railway company any power by law to alienate, " either for value or without value, any portion of the land actually " used for the railway or works," except so far as express provision to that effect is made in its regulating Act? From that he deduced, as was pointed out and approved by Rigby L.J. in *In re an Arbitration between Gonty and Manchester, Sheffield and Lincolnshire Railway Co.*,[39] that the grant of any easement was similarly forbidden.

Gonty's case [39] is yet another Court of Appeal case in which *Mulliner* [40] was commented on. The case itself amounted to a decision that, in considering whether part of a building could be severed from the rest "without material detriment thereto," that being the only condition upon which a railway company could effect the severance under a special statutory power, it was legitimate to treat the railway company as having legal power to grant a right of access over the portion proposed to be taken, and to assess compensation accordingly. I have not sufficient ingenuity at my command to be able to say how this decision can be good law in the face of *Ayr Harbour Trustees* v. *Oswald*,[41] in which it was decided by this House that in assessing compensation for injurious affection of land retained arising from compulsory acquisition of other land previously part of the same holding it was not legitimate to treat the undertakers as having legal power to grant a right of access over the land acquired. However that may be, in *Gonty's* case[42] Lord Esher M.R. appeared to regard *Mulliner*[43] as being inconsistent with the view that the undertaker could grant the right of access but as being an authority which he was not prepared to follow. A. L. Smith L.J. said[44] that he was not going to controvert *Mulliner*,[45] but thought that if it were to be "cited as a case which says that "the railway company cannot give an easement through its own "embankment from one side to the other" he could not agree with it. Unfortunately, the learned Lord Justice did not say what, in his view, *Mulliner*[45] could be cited for if not for that, and his illustration of the power or duty of a railway company to create an accommodation access through its embankment, when it severs land, does nothing to clear up the matter since, of course, in such a case there is a statutory obligation to provide just such accommodation. Rigby L.J., as I have said, thought that *Mulliner*[45] did decide that no perpetual right of way could lawfully be created by a railway company over land taken and required for its purposes. "That . . . is all that case was "intended to decide, and the case has no bearing on that "before us."[46]

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[30] 8 App.Cas. 623, 634–635.
[31] 11 Ch.D. 611.
[32] 21 Q.B.D. 273, 275.
[33] 11 Ch.D. 611.
[34] 5 B. & Ad. 269.
[35] [1924] 1 Ch. 211, 223.
[36] 11 Ch.D. 611.
[37] [1924] 1 Ch. 211, 232.
[38] 11 Ch.D. 611, 617, 619.
[39] [1896] 2 Q.B. 439.
[40] 11 Ch.D. 611.

For completeness, I ought to add that there have been further comments on or proffered explanations of *Mulliner*[47] in *Taff Vale Railway Co.* v. *Pontypridd Urban District Council*[48] and in *South Eastern Railway Co.* v. *Warr*.[49] Neither, I think, enables one to say with any confidence just how far it stands as an authority today or for what proposition.

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[41] 8 App.Cas. 623.
[42] [1896] 2 Q.B. 439.
[43] 11 Ch.D. 611.
[44] [1896] 2 Q.B. 439, 447.
[45] 11 Ch.D. 611.
[46] [1896] 2 Q.B. 439, 450.
[47] 11 Ch.D. 611.
[48] 93 L.T. 126.
[49] (1923) 21 L.G.R. 669.

How flickering is the illumination which these authorities throw upon the main principle of law can be seen if one compares the decision of Joyce J. in 1912 in *Great Central Railway Co.* v. *Balby-with-Hexthorpe Urban District Council*[50] with the decision of Swinfen Eady J. in 1909 in *South Eastern Railway Co.* v. *Associated Portland Cement Manufacturers* (1900) *Ltd.*[51] In the former the learned judge, after referring to *Mulliner*[52] and *Gonty*,[53] held[54] it to be clear law that a railway company could not grant or dedicate a right of way over its lines of rails. In the latter the learned judge, after referring to the same two cases, thought[55] that there was "nothing whatever in that point" that a railway company "could not grant . . . the easement of "tunnelling under" its line.

In my opinion, the root of the trouble lies in the fact that the courts have not truly accepted the validity of Sir George Jessel's proposition[56] that a railway company lacks legal capacity to grant an easement over railway land "except . . . with a view to "the traffic of their railway." Side by side with this proposition and without explicitly rejecting it they have in fact been accepting and working on a different rule for statutory undertakers, viz., that they can grant easements over their land so long as the exercise of such easements is not inconsistent or incompatible with the fulfilment of the statutory purpose. This rule is regarded as being derived from *Rex* v. *Inhabitants of Leake*.[57] I do not think it profitable to inquire at this date whether that case, fairly considered, did amount to a decision of the court embodying any such rule. If we were reviewing it for the first time today I should feel much doubt about that. But I think that we are bound to recognize that for very many years and on many occasions courts have taken as their test the words of Parke J.[58]: " . . . if such use by the public be not incompatible "with the objects prescribed by the Act, then I think it clear that "the commissioners have that power," and have treated this test as a pragmatic one, to be answered according to the facts ascertainable at the time when the question arises. Some of the cases which recognize this test as the governing rule have been referred to in the speech of the noble and learned Viscount on the Woolsack. As he says, there are others.

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[50] [1912] 2 Ch. 110; 28 T.L.R. 268.

[51] [1910] 1 Ch. 12; 26 T.L.R. 61.

[52] 11 Ch.D. 611.

[53] [1896] 2 Q.B. 439.

[54] [1912] 2 Ch. 110, 122.

[55] [1910] 1 Ch. 12, 25.

[56] 11 Ch.D. 611, 623.

[57] 5 B. & Ad. 469, 478.

[58] Ibid.

Such a rule has many drawbacks. It means that the validity of any easement must depend on the state of facts ascertained or reasonably foreseeable at the time when it is challenged in legal proceedings; and no one can tell in advance upon what occasion a challenge will arise. It is very hard to know what measure of foresight or what extremity of prudence to allow to the judge of fact. It leads to what may well be, I think, misleading comparisons between different statutory undertakers and their works—railway lines, reservoirs, canals, towpaths, drains and bridges. It has led to much confusion between the voluntary grant or dedication of a right de novo, the provision of accommodation ways or works under statutory obligation, and the voluntary enlargement of rights of way existing before the creation of the works and therefore necessarily preserved. Each of these classes may involve different considerations. When the distinctions have all been allowed for, I think that it is accurate to say that, although the test derived from *Rex* v. *Inhabitants of Leake* [59] has often been accepted and propounded, it has never yet resulted in a finding that the voluntary grant by a railway company of a right of way over its lines on the level of the lines is an effective grant. A possible exception is the case of *South Eastern Railway Co.* v. *Cooper* [60]: but the judgments delivered by the Court of Appeal in that case are not so expressed as to enable me to say with any certainty what was the ratio decidendi that formed the ground of their decision.

Nevertheless, I think that the accepted rule, with all its defects, is better than no rule at all. The construction of railways, at any rate, drove steel barriers over many hundred miles of the English countryside. To hold that at no time, at no point, and in no circumstances could a railway company grant de novo even a footway over, across, or under its lines would be a grave impediment to public amenity. In my opinion, therefore, we ought to say that *Mulliner* [61] cannot stand today as a binding decision in so far as it laid down the proposition that a railway company lacks legal capacity to grant a right of way over or under its railway lands, including the site of the permanent way. I think myself that the error in the reasoning of that case lay in treating any grant of an easement as equivalent to an alienation for this purpose. Technically, as a matter of conveyancing, such a grant is no doubt a form of alienation. But in the context of the powers of a railway company over the whole extent of the

[59] 5 B. & Ad. 469.
[60] [1924] 1 Ch. 211.
[61] 11 Ch.D. 611.

railway lands a grant of an easement and an outright sale may amount to very different things. It seems to me better to say baldly that on this occasion a great judge laid down a proposition of law in terms that are too comprehensive to be maintainable than to continue to explain his decision in language that he did not use to justify conclusions which contradict his expressed opinion.

Now, the other proposition which fortifies the appellants' arguments is that laid down in the two cases, *Paterson* v. *Provost, etc., of St. Andrews* [62] and *Ayr Harbour Trustees* v. *Oswald*.[63] *Paterson's* case [64] is the earlier in date, though *Oswald's* case [65] is, I think, the one more often referred to.

Both cases related to the question whether bodies holding land for purposes beneficial to the public interest could abdicate the potential exercise of certain powers over part of the land by ceding rights in it to other persons or to the public. In *Paterson's* case [66] the land concerned was the links at St. Andrews which were held by the magistrates of the burgh for behoof of the inhabitants, subject to the obligation of preserving them for the purposes of the game of golf and for the recreation and amusement of the inhabitants. What the magistrates were proposing to do was to construct a macadamized road along the boundary of the links. The learned Lords who heard the appeal, assisted by a volume of evidence from those skilled at golf, were evidently satisfied that there was no reason to fear that the addition of this feature would "interfere with the due prosecution of the "game" [67]; "such variation in the state of the ground as it would "introduce," said Lord Selborne L.C., "would, in the event of "balls finding their way there, rather add to than detract from "the interest of the game . . .": while Lord Watson, speaking with something like levity, observed [68] that "really the specula-"tion as to whether it is better to have a road with ruts in it, or a "metalled road, or a piece of grass with hollows and heaps, is "after all rather a matter of fancy than a question having any "substance in it." It followed that there was nothing in law to prevent the magistrates from making up their road and allowing people the use of it.

On the other hand, it was the clear view of all the members of the House who took part in that decision that it was not within the power of the magistrates to abdicate any part of their control of the site of the road or, consequently, to dedicate it as a public highway; and the judgment approved by the House was worded accordingly. The whole point of the decision was to establish the distinction between the competence of the magistrates to make a road and allow passage over it, and their incompetence to grant to the public or to individuals or to allow them to acquire any title to a right of way over it. Their opinion on this point is, I think, contained in the following words of Lord Watson [68]: " . . . such a change may come over St. Andrews " that it may become necessary in the due exercise of their " administrative powers for the town council to take away this " right of road. One cannot anticipate that such a thing will " immediately occur, but it may, and those who have the right " to take recreation, and to play golf upon the links, are quite " entitled to have a judgment which will prevent the magistrates " from making such an alienation at the present moment as may " come at any future period into collision with their rights over " this piece of land . . ." That imposes a very stern test. It does not depend on evidence. It looks to possibility, not to any standard of reasonable probability.

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[62] 6 App.Cas. 833.
[63] 8 App.Cas. 623.
[64] 6 App.Cas. 833.
[65] 8 App.Cas. 623.
[66] 6 App.Cas. 833.
[67] Ibid. 843.
[68] Ibid. 853.

The facts of *Oswald's* case [69] are so familiar that I do not need to set them out. The harbour board had acquired part of his land, and the question arose what amount of compensation they ought to pay him for injurious affection of the remainder. To reduce the damage and so his compensation they were ready to secure him a right of permanent access to that remainder over the part they had taken. There was no evident reason why they should not so lay out the projected wharves and roads as to leave space for access by this means. They did not have to fill up the land taken with buildings. Nevertheless, this House decided that they had no power to grant Oswald any permanent right over that land, because to do so would amount to depriving the present trustees and their successors of the discretion which their Act had vested in them, the power of using that land as the site of buildings if at any time the needs of their undertaking should require it. That would be to renounce " a part of their statutory " birthright," as Lord Sumner said in the *Birkdale* case.[70] Striking as the phrase is, it does not seem to me to offer much help in deciding which are the cases in which the principle of

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[68] 6 App.Cas. 833.

[69] 8 App.Cas. 623.

[70] [1926] A.C. 355, 372.

British Transport Commission v. Westmorland County Council. Same v. Worcestershire County Council.

Lord Radcliffe.

Paterson's case [71] and *Oswald's* case [72] is to be applied, where, as he says, " the very nature of the grants or the contract itself " provides the answer, and which are those many other cases in which the test to be applied is the humbler one of incompatibility proved by evidence. The birthright of a statutory corporation includes all those powers and rights with which it is thought proper to invest it at its creation: and I do not think it easy for a court of law to decide merely by the nature of the thing which of those powers are inalienably entailed and which can be disentailed and disposed of by ordinary grant.

In my opinion, we are bound to recognize that the principle of these two cases cannot be applied in all circumstances and on all occasions to all statutory corporations and public bodies. That, indeed, has already been recognized by the decision of this House in the *Birkdale* case,[73] in which the electric supply company had certainly made a contract which deprived themselves and their successors of power at any future time to raise the charges for their supply beyond a fixed limit, however much the needs of their undertaking might require it. It is of some importance to remember, when searching for a dividing line, that the two cases which " spoke for themselves " were both concerned with defined areas of land of no great extent, and the possible consequence of renouncing powers over such areas could be stated as a matter of practical observation. But nothing like the same observation can be brought to bear when the factors of the problem are, on the one hand, all the general powers derived by a railway company from the Railway Clauses Consolidation Act, 1845, and, on the other hand, many miles of railway lines covering great varieties of setting. In such cases what I have called the pragmatic test is, I think, to be preferred.

That consideration derives some support from the fact that we are dealing here with under- and over-bridges constructed as accommodation ways provided on severance. Such structures are not imposed upon the railway line ab extra by voluntary initiative of the railway undertakers themselves. On the contrary, their creation and maintenance for an indefinite period are conditions subject to which the undertakers are required to operate their line. Moreover, section 68, which imposes this condition, itself adds the proviso " the company shall not be required to make " such accommodation works in such a manner as would prevent

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[71] 6 App.Cas. 833.

[72] 8 App.Cas. 623.

[73] [1926] A.C. 355.

"or obstruct the working or using of the railway." But, if so, I cannot feel that there is much substance in the argument that the company had no power to grant a public right of way over such works because their existence is a natural defect to the best working of the line which ought to be removed as soon as the accommodation purpose is itself exhausted.

LORD COHEN. My Lords, I need not restate the facts. It is sufficient to say that it is common ground that (1) the facts found by quarter sessions in the Westmorland case would raise a presumption of dedication of the footpath in question as a public right of way provided that it was not ultra vires for the appellants or their predecessors in title so to dedicate it, and (2) there is no material distinction between the Westmorland case and the Worcestershire case. Quarter sessions, the Divisional Court and the Court of Appeal have all held that dedication was not ultra vires.

The Lord Chief Justice, delivering the judgment of the Divisional Court, adopted the test laid down by Lord Wensleydale, then Parke J., in *Rex* v. *Inhabitants of Leake*,[74] as follows: "If the land were vested by the Act of Parliament in "commissioners, so that they were thereby bound to use it for "some special purpose, incompatible with its public use as a high-"way, I should have thought that such trustees would have been "incapable in point of law, to make a dedication of it; but "if such use by the public be not incompatible with the objects "prescribed by the Act, then I think it clear that the commis-"sioners have that power." The Lord Chief Justice pointed out [75] that that case had been followed again and again, and went on to say that the question of incompatibility must be a question of fact to be decided by jury or judge, whichever in the particular case be the tribunal of fact. After distinguishing the case of *Ayr Harbour Trustees* v. *Oswald*,[76] he held that on their findings of fact quarter sessions came to a correct decision.

In the Court of Appeal each of their Lordships delivered a judgment. They adopted the same test as that which I have already cited from the judgment of the Lord Chief Justice, and held that on the facts found by quarter sessions they were bound by authority to uphold the decision of the courts below.

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[74] 5 B. & Ad. 469, 478.

[75] [1956] 2 Q.B. 214, 227–228; [1956] 2 All E.R. 129; affirming [1956] 2 Q.B. 226; [1956] 1 All E.R. 321.

[76] 8 App.Cas. 623.

Before your Lordships Sir Andrew Clark, for the appellants, did not dispute that *Rex* v. *Inhabitants of Leake* [77] was rightly decided on its facts, but after a careful and helpful review of the authorities, he submitted that: (1) It had no application to a case where, as here, dedication would involve the voluntary release or abandonment or modification of a power conferred on a statutory undertaker by a special Act, or by any Act incorporated therewith relating to the manner in which the statutory undertaker may deal with land acquired for the purposes of the Act; (2) *Rex* v. *Inhabitants of Leake* [77] did not lay down as the test of incompatibility whether there was any likelihood of the dedication of a right of way materially hindering the statutory undertaker from an adequate and efficient discharge of his duties. The test laid down, said Sir Andrew, was whether the grant of an easement over the land might in any possible circumstances at any future time hamper the undertaker in carrying out to the best advantage the purposes of its special Act.

The first of these submissions is founded on section 16 of the Railways Clauses Consolidation Act, 1845, which Act was, by section 1 of the Kendal and Windermere Railway Act, 1845, incorporated in the last-mentioned Act. Section 16 sets out the various works which a railway company may execute, and the section applies both to works for the construction of the railway and to accommodation works. The provision relied on by Sir Andrew was a provision that the company might from time to time alter, repair or discontinue the works and substitute others. This provision is followed by a provision conferring power to do all other acts necessary for making, maintaining, altering or repairing and using the railway.

I pause here to observe that it has been held that this last limb of section 16 is in reality a proviso upon the whole section, and that the works authorized by the section must be works necessary for making, altering, repairing or using the railway: see *Emsley* v. *North Eastern Railway Co.*,[78] *per* A. L. Smith L.J.

Sir Andrew argued that since it has been held that the obligation on a railway company to provide an accommodation way when its line severs a landowner's property remains in force only so long as the property on the two sides of the railway is in common ownership (see *Midland Railway Co.* v. *Gribble* [79]), the effect of dedicating a right of way over the accommodation bridge might be to prevent the exercise of this power of discontinuing the bridge. This, he said, amounted to the abandonment or modification of the statutory power.

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[77] 5 B. & Ad. 469.

[78] [1896] 1 Ch. 418, 434.

[79] [1895] 2 Ch. 827.

Dealing with this argument, the Lord Chief Justice said[80]: "If this contention be right, it is indeed strange that it has never "before been the subject of a decision or even mentioned in any "of the judgments on the subject. There does seem to be a trace "of an argument on this point in *Attorney-General ex rel. Barnes* "*Urban District Council* v. *London and South Western Railway* "*Co.*,[81] but it can hardly have been pressed as the judgment of "Farwell J. does not refer to it. In *Taff Vale Railway Co.* "v. *Pontypridd Urban District Council*,[82] had the point been "taken it would have afforded a short and complete answer." With these observations I respectfully agree.

Mr. Rowe, for the respondents, countered Sir Andrew's argument based on section 16 by two propositions.

I. First, he said that section 16 does not confer a bare power to discontinue but only a power to discontinue and substitute another work. He admits that the company could discontinue without substituting another bridge, but he says that it would do so not under the section but in exercise of the power which any landowner would have if by discontinuance he disturbs no existing right. Section 16, the argument ran, is directed to conferring on a railway company a power which merely qua landowner it would not have, i.e., a power against the will of the person entitled to the accommodation way to discontinue it and replace it by another accommodation way, paying, if necessary, compensation under the relevant provisions of the Act. Mr. Rowe submitted that since Sir Andrew's argument connoted discontinuance without substitution, section 16 had no relevance.

II. Mr. Rowe submitted that since the power to discontinue conferred by section 16 is ancillary to the power to make, alter, repair or use the railway (see *Emsley's* case[83]), it would be incredible that the existence of this ancillary power can prevent dedication in a case where, as here, on the facts it is held that the dedication of the right of way is not incompatible with the main purpose of the railway.

I agree with the second submission and do not, therefore, find it necessary to express a concluded opinion on the first. For the reasons I have given, I would reject the first of Sir Andrew's reasons for distinguishing this case from *Rex* v. *Inhabitants of Leake*.[84]

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[80] [1956] 2 Q.B. 214, 228.

[81] (1905) 69 J.P. 110; 21 T.L.R. 220.

[82] 93 L.T. 126.

[83] [1896] 1 Ch. 418.

If his second reason were well founded, it is difficult to conceive of a case in which a tribunal of fact could arrive at the conclusion that the dedication of the right of way was compatible with the objects prescribed by the Act. I doubt whether it could ever be said that in no possible circumstances at any future time could a railway company desire, for example, to widen its track. Sir Andrew, however, says that his proposition is supported by the language of Parke J. in *Rex* v. *Inhabitants of Leake*,[85] where he says: "I think, that if it is quite clear that such works would "never be required, the commissioners, whether special or "general, might give the right to the public." Sir Andrew stresses the word "never." The sentence, divorced from its context, lends some support to his argument, but reading the judgment as a whole, and having regard in particular to the next following paragraph thereof, I think it is clear that Parke J. regards the question as one of fact, to be determined, no doubt, not merely in the light of the position on the date of trial but in the light also of the probable future requirements of the company in the fulfilment of its railway purposes.

Sir Andrew also relied on the language of Jessel M.R. in *Mulliner* v. *Midland Railway Co.*,[86] where he said: "It appears "to me quite impossible that the railway company can have a "right either to sell, grant, or dispose of this land, or of any ease-"ment or right of way over it, except for the purposes of their "Act, that is to say, with a view to the traffic of their railway." The dispute in that case was as to a right of way granted by the railway company under one of the arches on which one of the company's railway stations was built. The evidence clearly established that the existence of the right of way would interfere with the company's railway undertaking and the grant was held to be ultra vires. The correctness of the decision has never been challenged, but the dictum to which I have referred, if divorced from the facts of the case, in my opinion goes too far. This view is supported by the observations of the members of the Court of Appeal in *Grand Junction Canal Co.* v. *Petty*,[87] and in *In re an Arbitration between Gonty and Manchester, Sheffield and Lincolnshire Railway Co.*[88] In the former case it was held that the dedication of land as a public footpath was not inconsistent with its use by the canal company as a tow-path, and in the latter it was held that the giving of a private right of way over certain lands of the railway company was not inconsistent with the purposes of the railway company. In the former case Lord Esher said that he did not think that in *Mulliner's* case [89] the late Master of the Rolls meant to decide anything in contravention of what was decided in *Rex* v. *Inhabitants of Leake*.[90]

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[84] 5 B. & Ad. 469.
[85] Ibid. 481.
[86] 11 Ch.D. 611, 623.
[87] 21 Q.B.D. 273.
[88] [1896] 2 Q.B. 439.

Sir Andrew also relied on the decision of this House in *Ayr Harbour Trustees* v. *Oswald*.[91] This case had been relied on by Sir Frank Soskice before the Divisional Court. Lord Goddard C.J. dealing with his argument said [92]: "In our opinion that case "has no application to the present. The harbour trustees were "empowered by statute to acquire compulsorily an area of land "for the purpose of their undertaking on payment of compensa- "tion to the owner of the land acquired. They sought to reduce "the amount of compensation by offering to enter into a covenant "with the dispossessed owner restricting themselves from build- "ing on or using a considerable portion of the land which the "Act permitted them to take. To this the owner objected and "claimed that he was entitled to be compensated for what he "had lost and that the company had no power to sterilize the "land, to use a convenient expression, and to covenant not to use "that which the statute authorized them to acquire. It was "held, to use Lord Sumner's expression in the *Birkdale* case,[93] "that the company could not thus dispose of their statutory "birthright. Here the dedication does not prevent the use of the "land by the railway though it burdens it, as must always be "the case where there is dedication."

With these observations I respectfully agree, and would only add that the very fact that the land the user of which it was proposed to restrict was included in the schedule connoted that its acquisition was then in the eyes of the legislature required for the purpose of the undertaking.

It is also to be observed that Lord Herschell did not regard the decision in *Ayr Harbour Trustees* v. *Oswald* [94] as inconsistent with the line of authorities following *Rex* v. *Inhabitants of Leake*,[95] for in *Caledonian Railway Co.* v. *Turcan & Co.*[96] he said: "In my view, without expressing any opinion upon the

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[89] 11 Ch.D. 611.

[90] 5 B. & Ad. 469.

[91] 8 App.Cas. 623.

[92] [1956] 2 Q.B. 214, 229.

[93] [1926] A.C. 355, 372.

[94] 8 App.Cas. 623.

[95] 5 B. & Ad. 469.

[96] (1898) 25 R.(H.L.) 7, 18.

"decision in that case" (*Gonty's* case[97]) "it does not conflict, "as has been supposed, with the case of *Oswald* v. *Ayr Harbour* "*Trustees.*"[98]

The last case to which I need refer is *Paterson* v. *Provost, etc., of St. Andrews.*[99] It was not cited in either of the courts below but Sir Andrew submitted that it was really conclusive in his favour. The question at issue was as to the powers of the corporation in relation to the links, the property in which was vested in the corporation, subject to the obligation admitted to have subsisted from time immemorial of preserving the links for the purposes of the game of golf and for the recreation and amusement of the inhabitants.

The case is somewhat remote from the present case, but properly understood it seems to me to support the respondents' case. I would refer to a passage from the speech of Lord Watson where he says[100]: "Now, my Lords, although they hold it "subject to these rights on the part of the inhabitants, the magis- "trates and council remain undivested to any further extent of "their proprietary rights, and are therefore entitled either to "make or to sanction any other uses to which the property is "convertible so long as those uses are not inconsistent with the "due enjoyment by the burgesses of the rights vested in them by "law. What uses they may so sanction will depend to a very "great extent upon the amount of population and the amount of "the golf played or recreation taken. Uses which would be "perfectly legitimate and proper in a thinly populated burgh may "become very illegitimate and very improper, and may constitute "invasions of the burgesses' rights, when practised where there "is a large population.

"My Lords, what the magistrates and town council were pro- "posing to do at the time when this action was raised appears "to me to have been this, they were acting upon the assumption "that it was within their competency to confer upon the public "at large a right of way over a portion of the ground which it "was their duty to preserve for purposes consistent with the "rights of the inhabitants; and they justified their position upon "the ground that as matters stood at that date, no right of the "inhabitants would be invaded thereby. I think that was a mis- "taken view of the law and of the extent of their power, because "they would thereby have vested in others a right which might

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[97] [1896] 2 Q.B. 439.
[98] 8 App.Cas. 626.
[99] 6 App.Cas. 833.
[100] Ibid. 851–852.

" become inconsistent with the rights of the inhabitants at some " future time.

" The appellants brought this action no doubt with a view to " stop the threatened proceedings, but they did not limit the " conclusions of their summons to the actual proceedings which " the council were threatening to take, but made them so wide " that, if given effect to, they would establish this proposition, " that wherever a right of golfing or of recreation exists the magis- " trates cannot give a comfortable or convenient right of passage " over the ground reserved for that purpose, although the so " giving it may not interfere to the smallest extent with the " rights of the burgesses."

I read that passage as laying down that it was a question of fact whether what the corporation proposed to do would interfere with the rights of the burgesses. Lord Watson no doubt stressed that in reaching a conclusion on that issue of fact the court must have regard not only to the position as it was at the moment of trial but also to what was likely to happen in the future, but I find nothing in *Paterson's* case [101] disapproving of the statement of the law by Parke J. in *Rex* v. *Inhabitants of Leake*,[102] or of the application of that statement of the law in the many cases to which reference was made in the course of the argument.

Paterson's case [103] was referred to by Lord Birkenhead in *Birkdale District Electric Supply Co. Ltd.* v. *Southport Corporation* [104] and he did not suggest that it conflicted with *Rex* v. *Inhabitants of Leake*.[105] In the same case Lord Sumner referred with approval to *Rex* v. *Inhabitants of Leake* [105] and [106] explained the *Ayr Harbour* case [107] as being a case where the res ipsa loquitur maxim applied and the question of competence did not depend on a proved incompatibility between statutory purposes and the proposed user. It was in this case that Lord Sumner used the picturesque phrase " statutory birthright " [108] and explained the *Ayr Harbour* case [109] as being one in which the trustees were proposing to renounce a part of their statutory birthright. It is, however, plain from his speech that he considered that the question whether a company was renouncing or seeking to renounce its statutory birthright would normally be a question of fact to be decided on the evidence.

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[101] 6 App.Cas. 833.
[102] 5 B. & Ad. 469.
[103] 6 App.Cas. 833.
[104] [1926] A.C. 355.
[105] 5 B. & Ad. 469.
[106] [1926] A.C. 355, 372.
[107] 8 App.Cas. 623.
[108] [1926] A.C. 355, 372.
[109] 8 App.Cas. 623.

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British Transport Commission v. Westmorland County Council. Same v. Worcestershire County Council.

Lord Cohen.

Reading his judgment as a whole, I think he was approving the decision in *Rex* v. *Inhabitants of Leake* [110] and stating in other language the principle there laid down by Parke J. that the question whether there is power to dedicate a right of way depends on whether the user by the public of that right of way would be compatible with the object prescribed by the statute appointing commissioners or creating the statutory company as the case might be. The question remains as to the test of compatibility. On that I cannot usefully add anything to what has been said by my noble and learned friend on the Woolsack and by Lord Morton of Henryton. I agree with the test they propose. As I read the case stated, that was the test applied by quarter sessions in the present case.

For these reasons I agree that the appeal should be dismissed.

Lord Keith of Avonholm. My Lords, I agree and, but for the fact that certain Scottish authorities were referred to and stressed in the argument for the appellants, I would have had nothing to add. No differences that exist between the laws of the two countries in the matter of constitution of public rights of way affect, in my opinion, the principles upon which these cases fall to be decided. The law of Scotland is certainly no less favourable to the constitution of a right of way in circumstances such as the present than the law of England.

The Scottish case nearest in its facts is *Magistrates of Edinburgh* v. *North British Railway Co.*[111] Lord Kinnear in that case held that the necessary user to establish a public right of way over a railway within the confines of Edinburgh had not been established. He expressed, however, an alternative ground of judgment which is stated in the headnote to the case as: "*Opinion* "that a public right of way cannot be acquired by user over lands "held by a railway company for the purposes of the railway, "and that it makes no difference that the lands have been "acquired by private agreement, and not by the exercise of com- "pulsory powers." If Lord Kinnear was intending to lay down as a matter of law that in no circumstances could the public acquire a right of way over railway property, I think, with all respect to the great authority of that eminent judge, that such an opinion is not consistent with the train of authority to which your Lordship on the Woolsack has referred. There are, however, in Lord Kinnear's opinion passages that suggest he was perhaps influenced by the fact that in the circumstances of that

[110] 5 B. & Ad. 469.

[111] (1904) 6 F. 620.

case a public right of passage was incompatible with the conduct of the traffic on the railway, and if that was the ground of his opinion it was entirely consistent with English authority.

The case of *Ayr Harbour Trustees* v. *Oswald*[112] creates no difficulty. That was a very plain case of ultra vires. It did not turn upon any question of conflict of rights, but upon whether harbour trustees had any power to sterilize land which they proposed to acquire compulsorily by binding themselves and their successors not to use it for the statutory purposes for which alone it could be acquired. Lord Sumner in *Birkdale District Electric Supply Co. Ltd.* v. *Southport Corporation*[113] covers such a case where he says " . . . in default of proof of incompatibility in the " present case, some other consideration of a cogent kind must " be found." Another consideration of a cogent kind existed in the *Ayr Harbour Trustees* case,[114] as Lord Sumner himself recognized. I would only add that the observations of Lord Watson and Lord Herschell in *Caledonian Railway Co.* v. *Turcan & Co.*[115] do not suggest that they thought the creation of a right of way over land acquired under statutory powers was so obviously impossible that it could be condemned out of hand. They leave the decision in *In re an Arbitration between Gonty and Manchester, Sheffield and Lincolnshire Railway Co.*[116] not, it is true, approved, but at least undisturbed.

The case of *Paterson* v. *Provost, etc., of St. Andrews*[117] was much relied on by appellants' counsel, but I doubt whether it is apt as an authority in the territory with which the present appeal is concerned. The magistrates of St. Andrews held certain land for the enjoyment by the inhabitants of St. Andrews of golfing and recreation thereon. They were in effect trustees of the land for these purposes. The point at issue was focused by Lord Watson in the following passage[118]: " . . . they [the magistrates " and town council] were acting upon the assumption that it " was within their competency to confer upon the public at large " a right of way over a portion of the ground which it was their " duty to preserve for purposes consistent with the rights of the " inhabitants; and they justified their position upon the ground " that as matters stood at that date, no right of the inhabitants " would be invaded thereby. I think that was a mistaken view " of the law and of the extent of their power, because they would

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[112] 8 App.Cas. 623.
[113] [1926] A.C. 355, 370.
[114] 8 App.Cas. 623.
[115] 25 R.(H.L.) 7.
[116] [1896] 2 Q.B. 439.
[117] 6 App.Cas. 833.
[118] 6 App.Cas. 833, 851–852.

BRITISH TRANSPORT COMMISSION v. WESTMORLAND COUNTY COUNCIL. SAME v. WORCESTERSHIRE COUNTY COUNCIL.

Lord Keith of Avonholm.

"thereby have vested in others a right which might become inconsistent with the rights of the inhabitants at some future time." That the magistrates could do no positive act that was in breach of their duty to the inhabitants is clear. But it does not follow that by tacit acquiescence, indifference, or neglect they might not have allowed a public right of way to be established over the golf links. I know of no authority or principle which would have prevented the public, by appropriate use of a path over the golf links from one public place to another for an uninterrupted period of 40 years, from establishing the existence of a public right of way. The principle of presumed dedication has no place in the law of Scotland and accordingly it is not possible, in my opinion, to build up on the case of *Paterson* [119] any argument favourable to the appellants.

On the facts proved here the assumed inconsistency of the existence of a right of way with the subsidiary powers conferred on the appellants by section 16 of the Railways Clauses Consolidation Act, 1845, seems to me unreal. Whether the appellants could at some future time remove the bridge does not at the moment call for consideration. Even if they could and did, it does not follow that the right of way would disappear, nor has it been shown that the exercise of the right of way would then become incompatible with the running of the railway. Incompatibility is a question of fact, not a question of law, and where the facts are such as would be sufficient to presume dedication to the public of a right of way in all other respects it is, in my opinion, for the statutory undertaker to prove incompatibility, and not for those asserting the right to prove compatibility. The speech of Lord Sumner in *Birkdale District Electric Supply Co. Ltd.* v. *Southport Corporation*,[120] though given in a somewhat different kind of case, contains passages to the same effect and in this matter I think no distinction can be taken between the two cases.

I would dismiss these appeals.

Appeals dismissed.

Solicitors: *M. H. B. Gilmour; Sharpe, Pritchard & Co. for Clerks to Worcester and Westmorland County Councils.*

F. C.

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[119] 6 App.Cas. 833.

[120] [1926] A.C. 355.

MOHAMED FIAZ BAKSH . . . . APPELLANT;

AND

THE QUEEN . . . . RESPONDENT.

J. C.*
1958
Feb. 13;
Mar. 11.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF BRITISH GUIANA.

Criminal Law—Appeal—Fresh evidence—Statements by prosecution witnesses to police—Not available at trial—Material discrepancies when compared with oral evidence—Whether new trial should have been ordered—Murder—British Guiana.
British Guiana.

The appellant and his co-accused (who had each relied on an alibi) having been convicted of murder, both appealed to the Court of Criminal Appeal of British Guiana, who permitted to be produced and proved on the hearing of the appeal statements, which had not been available at the trial, made to the police by the three main witnesses for the prosecution. The Court of Criminal Appeal found that a comparison of the statements with the oral evidence given by those witnesses at the trial disclosed material discrepancies. They said in respect of the appellant's co-accused that in the interests of justice the value and weight of the new evidence should be determined by a jury and not by that court, and they quashed his conviction and ordered a new trial. In the case of the appellant, however, they were of opinion that different considerations applied; they considered that nothing favourable to him could have been obtained from the statements which was not obtained at the trial, and held that the jury's verdict in respect of him could not be disturbed on that ground:—

Held, that if the statements afforded material for serious challenge to the credibility or reliability of the witnesses on matters vital to the case for the prosecution, the defence by cross-examination might have destroyed the whole case against both accused or, at any rate, shown that the evidence of those witnesses could not be relied on as sufficient to displace the evidence in support of the alibis. Their credibility could not be treated as divisible and accepted against one and rejected against the other. A new trial should have been ordered in both cases.

The case would be remitted to the Court of Criminal Appeal with the direction that they should quash the conviction of the appellant and either enter a verdict of acquittal or order a new trial, whichever course they considered proper in the interests of justice in the existing circumstances.

APPEAL (No. 26 of 1957), by special leave, from a judgment of the Court of Criminal Appeal of British Guiana (June 7, 1957), dismissing the appellant's appeal from a judgment of the Supreme Court of British Guiana (Clare J. and a jury) (December 5, 1956), whereby the appellant was convicted of murder and sentenced to death.

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* *Present*: LORD REID, LORD TUCKER, LORD SOMERVELL OF HARROW, LORD DENNING and the RT. HON. L. M. D. DE SILVA.

The following facts are taken from the judgment of the Judicial Committee: The appellant had been charged jointly with one Nabi Baksh with the murder of Mohamed Saffie on June 12, 1956. Nabi Baksh was also found guilty.

Both prisoners appealed to the Court of Criminal Appeal of British Guiana (Holder C.J., Stoby and Date JJ.), and on June 7, 1957, that court dismissed the appellant's appeal but quashed the conviction of Nabi Baksh and ordered a new trial in his case.

The appellant appealed by special leave to Her Majesty in Council and his appeal was heard by the Board on February 13, 1958.

The case for the prosecution was that the deceased man was killed shortly after 3 a.m. on June 12, 1956, by shots from a gun fired by one or other of the two accused men acting together with the common design of killing or doing grievous bodily harm to the deceased. The case rested largely on the identification of the accused by three prosecution witnesses named Mohamed Haniff, the deceased's brother-in-law, Mohamed Nazir, brother-in-law of Haniff, and Bebe Mariam, who had been living with the deceased. Haniff at the trial swore that on June 12 he was living with the deceased at a house at Clonbrook, East Bank, Demerara. Also living in the house were Nazir and his wife and Bebe Mariam. He woke about 3 a.m. and helped the deceased and Nazir load a boat with vegetable produce, and then returned to the house with the deceased. Nazir and his wife and Bebe Mariam went away with the boat. He went to lie on his bed, and before Nazir returned with the boat he heard gun-fire from the kitchen direction and went to the window with his torch. He saw two men whom he could identify. He shouted to them: "Alright Fiaz and Jacoob "no use run any more I see you already." Nabi Baksh was known as Jacoob. He saw a gun in the appellant's right hand. He ran downstairs and saw deceased lying at the top of the step leading from the kitchen. Nazir was there, and they lifted the deceased and placed him on his back.

He said that he had been acquainted with both accused for three or four weeks before June 12.

Nazir swore that after he had taken his wife and Bebe Mariam with the vegetable produce to the bus when he reached the spot where he usually tied his boat he heard a shot. He ran underneath his house and from there saw the appellant and Nabi Baksh crossing a trench near the house. He heard Haniff shout to them "Alright Fiaz and Jacoob, don't run I see you." He turned his torch on them and saw the appellant had a gun.

Bebe Mariam swore that she and the deceased were awakened about 2.30 a.m. on June 12 by the barking of dogs and that by a torchlight she saw the appellant and Nabi Baksh about 48 yards away from the house. She said that she had known them for about two years.

Neither of the accused gave evidence, but in statements from the dock denied that they were anywhere near the scene of the murder. They gave an account of their movements and said that the statements they had given to the police were true. They both called a number of witnesses in support of their alibis.

Both prisoners appealed, and on May 13, 1957, counsel who had appeared on behalf of Nabi Baksh at the trial swore an affidavit stating that at his request the Solicitor-General had allowed him to inspect the statements made to the police by the witnesses Haniff, Nazir and Bebe Mariam on the morning of June 12, 1956, which had not been available to him at the trial, and that these statements showed serious discrepancies and contradictions in vital matters when compared with the evidence given by them at the trial. The Court of Criminal Appeal accordingly allowed these statements to be produced and proved. They were found to contain the following discrepancies—Haniff in his statement had said that after he heard the gunshot he looked out of the window and shone his torch and saw the appellant and another man whom he did not know by name on the parapet of the trench dividing the yard and the rice field; that he ran on the bridge and was all the time shouting "all right "Fiaz, all you run, me see all you two."

Nazir had said that neither he nor Haniff had shouted at the men who were escaping because they were afraid of being shot.

Bebe Mariam had said that when she was awakened by the barking of dogs she saw the appellant by the light of her husband's flashlight running away in the rice field south of her home.

After examining the statements and comparing them with the sworn testimony at the trial the Court of Criminal Appeal in their judgment delivered on June 7, 1957, said: "From an examination of the additional evidence it will be seen that Bebe Mariam "made no mention of seeing Nabi Baksh on the morning of "June 12 shortly before the shooting; Mohamed Haniff did not "know the name of the man he saw with Fiaz Baksh and therefore could not have called it out. Had the jury known these "facts we are unable to say that inevitably they would have "arrived at the same conclusion. They may have done so "because they may have accepted Mohamed Nazir's evidence "that he saw the two appellants, or the two witnesses already "mentioned may have been able to explain or amplify their "original statements."

They went on to say that in their view, in respect of Nabi Baksh, in the interests of justice the value and weight of the evidence should be determined by a jury and not by that court. They accordingly quashed the conviction in his case and ordered a new trial.

With regard, however, to the present appellant, they considered entirely different considerations applied. They could find a good deal unfavourable and nothing favourable to him in the statements and considered that nothing favourable to him could have been obtained therefrom which was not obtained at the trial. They accordingly held that the jury's verdict in respect of this appellant could not be disturbed on this ground.

1958. Feb. 13. *Bernard Gillis Q.C.* and *J. Lloyd-Eley* for the appellant. The statements having been admitted, at the hearing before the Court of Criminal Appeal the Chief Justice said that the court were of opinion that the discrepancies between the statements and the oral evidence given by those witnesses at the trial were so startling that they struck at the root of the case for the prosecution and justice demanded that they should have been disclosed to the defence. Having quashed the conviction of, and ordered a new trial of, Nabi Baksh, the court said that different considerations applied in the case of the appellant, and pointed out that in each of the three statements the appellant had been positively identified, and they dismissed his appeal. Subsequently the Crown entered a nolle prosequi in respect of Nabi Baksh on the ground that in the opinion of the Law Officers it would be dangerous to ask the jury to accept the evidence of identification, and he was freed. The submission is that the discrepancies disclosed that those witnesses were wholly discredited. They were fundamental discrepancies. That being so, one cannot sever the credit of a witness, and if he has given perjured evidence —which is the consequence of the observations of the Court of Criminal Appeal—the case for the prosecution cannot be allowed to stand as regards another appellant with regard to whom those witnesses have also given incriminating evidence. Had the jury had before them the false information of those witnesses with

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regard to one of the accused, it cannot be said that they must inevitably have convicted in the case of the other—they may not necessarily have returned the same verdict.

The appellant has been denied the substance of a fair trial. There was in the possession of the prosecution at the time of his trial evidence of a most cogent character to the effect that the witnesses had given false evidence; he was therefore deprived of the strongest possible weapon when he was seeking to challenge the honesty of the witnesses for the prosecution. It must be admitted that as soon as counsel and the authorities were aware of the discrepancies proper facilities were given for the production of the statements. If material is in the prosecution's possession which will destroy their case, it is their duty to disclose it. A further ground of appeal is that there was misdirection by the trial judge in directing the jury that the onus of proof was on the accused to establish the alibi.

There is a paucity of authority on the main submission, but see *Reg.* v. *Puddick.*[1] The whole of the material is before the Board, and in all the circumstances it is submitted that the conviction should be quashed or that the appellant should be placed in the same position as his co-accused and a new trial ordered. [Reference was also made to *Reg.* v. *Collister.*[2]]

J. G. Le Quesne for the Crown. It was the duty of the Criminal Appeal Court to say: "Would this new evidence affect "the decision of reasonable men in this case?" That is the correct test. For the Crown to succeed, the Board must be satisfied that the Court of Criminal Appeal must with justification have taken the view that no reasonable jury would have returned a different verdict in respect of the appellant if this new material had been used at the trial. The fact that the jury might be affected by these statements as regards Nabi Baksh does not necessarily involve the proposition that a reasonable jury would similarly have been affected in the case of this appellant. The effect of the new evidence was quite different in the case of Nabi Baksh from that of the appellant; the three statements left the appellant implicated by those three witnesses just as he was implicated by the evidence of the Crown. In his case there was no contradiction but consistent testimony of identification all the way through. The Court of Appeal were entitled to say, as they did, that if those statements had been before the jury they would not have been affected in their view of the guilt of the appellant.

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[1] (1865) 4 F. & F. 497.

[2] (1955) 39 Cr.App.R. 100.

There is no rule to say that this conviction should be quashed merely because material has been withheld. Further, it would not be the right course for the Board to quash the conviction at this stage.

Feb. 13. Lord Reid said: "The appeal will be allowed and "the case remitted to the Court of Criminal Appeal of British "Guiana with a direction that they should quash the conviction "and either enter a verdict of acquittal or order a new trial, "whichever course they may consider proper in the interests of "justice in the existing circumstances. Their Lordships will "give their reasons for their decision at a later date."

March 11. Their Lordships' reasons for allowing the appeal were delivered by Lord Tucker, who stated the facts set out above and continued: Their Lordships are unable to accept the reasoning of the Court of Criminal Appeal on this matter. If these statements afforded material for serious challenge to the credibility or reliability of these witnesses on matters vital to the case for the prosecution it follows that by cross-examination—or by proof of the statements if the witnesses denied making them—the defence might have destroyed the whole case against both the accused or at any rate shown that the evidence of these witnesses could not be relied upon as sufficient to displace the evidence in support of the alibis. Their credibility cannot be treated as divisible and accepted against one and rejected against the other. Their honesty having been shown to be open to question, it cannot be right to accept their verdict against one and re-open it in the case of the other. Their Lordships are accordingly of opinion that a new trial should have been ordered in both cases.

It remains only to say that their Lordships are in complete agreement with the view expressed by the Court of Criminal Appeal with regard to the criticisms which were made, and which have been repeated before the Board, of the trial judge's summing-up with respect to the onus of proof in connexion with the defence of alibi. Taking the summing-up as a whole, the jury could have been left in no doubt that the onus remained on the prosecution throughout to establish the guilt of the accused.

For the reasons stated above, their Lordships have humbly advised Her Majesty that the appeal should be allowed and the case remitted to the Court of Criminal Appeal of British Guiana with the direction that they should quash the conviction of the

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appellant and either enter a verdict of acquittal or order a new trial, whichever course they consider proper in the interests of justice in the existing circumstances.

Solicitors: *Hy. S. L. Polak & Co.; Charles Russell & Co.*

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March 19.

MARY NG . . . . APPELLANT;

AND

THE QUEEN . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF THE COLONY OF SINGAPORE.

Burden of Proof—Criminal case—Facts especially within knowledge of accused—No burden on accused to prove that no crime has been committed—Onus on prosecution to prove commission of offence—Evidence Ordinance (Laws of Singapore, 1955, *c.* 4), *ss.* 107, 115.
Singapore. Ceylon—Ceylon Evidence Ordinance, s. 106.

By section 107 of the Singapore Evidence Ordinance: " When " any fact is especially within the knowledge of any person, the " burden of proving that fact is upon him."

The appellant was charged with and convicted of attempting to cheat a man and thereby attempting dishonestly to obtain money from him by representing to him that she was able to induce the magistrate before whom the man was to be charged with a criminal offence to show favour to him. The trial judge held that whether or not the appellant could induce the magistrate to show favour to the accused man was a fact which was especially within the knowledge of the appellant, and that under section 107 of the Evidence Ordinance the onus was on her to prove that she could induce the magistrate to show favour:—

Held, that by reason of section 107 no burden was placed on the appellant to prove that there had been no deceit. The burden was on the prosecution to prove affirmatively that there had been. It should have been made to appear sufficiently on established facts that the appellant had no reason to believe that she could have influenced the magistrate, and that had not been done. There was in fact no evidence against the appellant on a principal ingredient of the charge, namely, deceit, and the case therefore came within the range of cases in which the Board would interfere.

Dictum in *Attygalle* v. *The King* [1936] A.C. 338, 341; 52 T.L.R. 390; [1936] 2 All E.R. 116, that "It is not the law of

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* *Present*: LORD REID, LORD TUCKER, the RT. HON. L. M. D. DE SILVA.

"Ceylon"—section 106 of the Ceylon Evidence Ordinance being identical with section 107 of the Singapore Ordinance—"that the "burden is cast upon an accused person of proving that no crime "has been committed," applied.

Decision of the High Court of Singapore reversed and conviction quashed.

Appeal (No. 20 of 1957), by special leave, from a judgment of the High Court of the Colony of Singapore (Knight J.) (June 17, 1957), dismissing an appeal from a judgment of the First Criminal District Court of Singapore (Chua D.J.) (October 9, 1956), whereby the appellant had been convicted on a charge of attempting to cheat and thereby attempting to obtain $2,500 from one Hou Say Lian by representing that she was able to induce a magistrate to show favour to him in a case in which he had been charged with being in possession of prepared opium and smoking utensils. The appellant, who had denied the charge, was sentenced to three months' imprisonment and a fine of $5,000, the fine being reduced by the High Court to $3,000.

Section 107 of the Evidence Ordinance of Singapore provided that: "When any fact is especially within the knowledge of any "person, the burden of proving that fact is upon him," and a question in this appeal was whether, as held by the trial judge, section 107 placed on the appellant the onus of proving that she could induce the magistrate to show favour to Hou Say Lian, or whether the burden was on the prosecution to prove affirmatively that there had been deceit.

1958. Jan. 27, 28. *Bernard Gillis Q.C.* and *John Lloyd-Eley* for the appellant. The main matters involved in this appeal relate to the effect of certain statutory provisions on the burden of proof resting on the prosecution in criminal proceedings, and concern the extent and ambit of certain rules of evidence to be found in sections 107 and 115 of the Evidence Ordinance of Singapore. Section 107 provides that "When any fact is especially "within the knowledge of any person, the burden of proving "that fact is upon him," and by section 115 "The court may "presume the existence of any fact which it thinks likely to have "happened, regard being had to the common course of natural "events, human conduct, and public and private business, in "their relation to the facts of the particular case." In so far as those are rules of evidence they must be subject to the general principle of law which places on the prosecution the onus of proving the offence charged against the accused person. No rule of evidence can set aside substantive law. Section 107 does not place on the appellant the burden of disproving the central question of deception. That section has no place in the criminal law if its purport is to detract from established doctrine relating to the onus of proof in all cases. The first interpretation of section 107 is that it applies to civil matters only, because if it were intended to alter so substantially the age-old principles of the criminal law, there would have been something in the words themselves to make that clear beyond argument. There appears to be no decision on exercising criminal jurisdiction in which these sections have been relied on in the way in which they were relied on below in this case.

J. G. Le Quesne, for the Crown, intervening. Section 107 of the Singapore Evidence Ordinance is taken practically verbatim from section 106 of the Indian Evidence Act; it also appears in exactly the same terms in section 106 of the Ceylon Evidence Ordinance, and there were two decisions of the Board in 1936 on the latter section.

Gillis Q.C. Section 107 cannot, it is submitted, affect the law as to the burden of proof being on the prosecution. With regard to section 115, the magistrate could not have been induced by the appellant to show favour to the accused and, it is submitted, was not so induced. Section 115 has no effect in criminal proceedings to remove from the Crown the burden of proving the essential element in the offence charged. Unless it was proved that the appellant had no such influence, the offence of cheating had not been established. It was said in *Attygalle* v. *The King* [1] —a case on section 106 of the Ceylon Evidence Ordinance—that "It is not the law of Ceylon that the burden is cast upon an "accused person of proving that no crime has been committed." In a prosecution for a crime the offence alleged—every element in it—must be proved by the Crown, and nothing in section 107 can take away that duty. As is stated in the argument in *Attygalle's* case,[2] "section 106 is not to be construed as contravening "any fundamental principle of English law." The matter was also referred to in *Seneviratne* v. *The King*.[3] Whether one looks at section 107 or section 115, they cannot be read to set aside the recognized principles of criminal law. In *Chan Kau* v. *The Queen* [4] it is again made clear that the onus is on the prosecution at all stages.

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[1] [1936] A.C. 338, 341; 52 T.L.R. 390; [1936] 2 All E.R. 116.

[2] [1936] A.C. 340.

[3] [1936] 3 All E.R. 36.

[4] [1955] A.C. 206; [1955] 1 All E.R. 266.

What was done here was to say that the essential element of deception in the offence charged was within the knowledge of the appellant and that the burden of proving that part of the prosecution fell upon her. The basis of the charge of which the appellant was convicted was cheating; therefore the prosecution were faced with the burden of proving two main propositions: (1) that the representation alleged in the indictment was actually made, and (2) that it was false—that she was not in a position to exercise influence; and they have failed. Not only was there no evidence that the alleged representation was false, there was some evidence that it was true—there was evidence at the end of the prosecution's case that she could exercise the influence that she said she could. It was said in *Cotterill* v. *Lempriere* [5] that "the question in this country is not, as it is in many countries "abroad, simply whether the person charged is guilty or not "guilty, but whether the prosecution proves the case strictly "and in form." That principle is constantly indicated in the law relating to false pretences. Every essential element has to be proved by evidence, and that does not mean a matter of establishing the fact by any presumption. [On presumptions of law reference was made to Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., p. 427, para. 706; on the value of illustrations to a statute, to *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* [6]; and on the submission of no case, to *Reg.* v. *Abbott.* [7]] There was no evidence on which the appellant's conviction could be sustained. There has been a disregard of the due forms of legal process resulting in a miscarriage of justice.

J. G. Le Quesne for the Crown. Indian cases on section 106 of the Indian Evidence Act (which is identical with section 107 of the Singapore Ordinance) show that all the sections of the Singapore Ordinance are to be applied in criminal cases as well as in civil cases—the reference in section 2 of the Singapore Ordinance to courts-martial makes that quite clear. *Deputy Legal Remembrancer* v. *Karuna Baistobi* [8] shows the way in which section 106 of the Indian Act has been used in criminal proceedings: see also *Balmakand Ram* v. *Ghansamram,* [9] from which it appears that the draftsman of the Indian Act was intending to lay down a standard of proof applicable to both civil and criminal proceedings. The Board here is not concerned with the standard of proof, but with the question of where the burden of proving a particular matter lies. It is conceded that on the authorities it is very difficult for the Crown to maintain that the burden of proving anything in the fullest sense is transferred to a defendant in criminal proceedings by the Evidence Ordinance. It cannot be maintained that the burden of proving any part of the offence charged is transferred to the accused—or, put the other way, that the burden of proving that any part of the offence does not exist is on the accused.

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[5] (1890) 24 Q.B.D. 634, 639; 6 T.L.R. 262.

[6] [1916] 2 A.C. 575; 32 T.L.R. 673.

[7] [1955] 2 Q.B. 497; [1955] 2 All E.R. 899.

[8] (1894) I.L.R. 22 Cal. 164.

[9] (1894) I.L.R. 22 Cal. 391.

King-Emperor v. *U. Damapala* [10] shows that *Woolmington* v. *Director of Public Prosecutions* [11] is in no way inconsistent with the law of British India. *Attygalle* v. *The King* [12] and *Seneviratne* v. *The King* [13] establish that under the Singapore Ordinance it is always for the Crown to prove that the offence charged has been committed by the accused, but there are certain matters going to defence as to which, if the accused wishes to rely on them, it is for him to lead evidence. At the time when the submission of no case to answer was made in the present case there was evidence which justified the judge in rejecting the submission. When the whole case was over, there was a great deal more evidence which justified him in finding the appellant guilty. The judge considered that evidence properly in reaching his conclusion, and it is not a conviction with which the Board should interfere. [Reference was made to *Rex* v. *Power*.[14]] If the appellant has been convicted on evidence which establishes her guilt of the offence, then it is impossible to say that there has been a gross miscarriage of justice: *Mohindar Singh* v. *King-Emperor*.[15]

Gillis Q.C. in reply. There has been a miscarriage of justice because (i) at the end of the Crown's case the appellant was not acquitted, there then being no evidence against her, and (ii) even looking at the matter as a whole, there still remains no evidence. Both courts below departed from the fundamental principles of law relating to onus of proof in criminal cases; the appellant has been deprived of the protection of the rule that the prosecution must prove its case. This Board will interfere where there is a likelihood of the law being diverted into an evil precedent (*Dharmasena* v. *The King* [16]), and the course followed by the judges below tended to do that.

[10] (1936) I.L.R. 14 Rang. 666.

[11] [1935] A.C. 462; 51 T.L.R. 446.

[12] [1936] A.C. 338.

[13] [1936] 3 All E.R. 36.

[14] [1919] 1 K.B. 572; 35 T.L.R. 283.

[15] (1932) L.R. 59 I.A. 233.

[16] [1951] A.C. 1, 12.

March 19. The judgment of their Lordships was delivered by the Rt. Hon. L. M. D. de Silva. There were two charges in the alternative against the appellant framed thus:

"CHARGE

"You Mary Ng are charged that you between 26th February "and 28th February, 1956, at Singapore, attempted to obtain "from one Hou Suai [sic] Lian for yourself a gratification of two "thousand five hundred dollars as a reward for inducing, by the "exercise of personal influence, a public servant, to wit, Mr. J. M. "Devereux-Colebourn, 4th Magistrate, Singapore, in the exercise "of his official functions as 4th Magistrate, to show favour to the "said Hou Suai Lian in connexion with 4th Magistrate Court "Case No. 1571/55, and thereby committed an offence punishable "under section 163 of the Penal Code (Cap. 119).

"Alternatively,

"You Mary Ng are charged that you, between 26th February "and 28th February, 1956, at Singapore, did attempt to cheat "one Hou Suai [sic] Lian by representing to him that you were "able to induce Mr. J. M. Devereux-Colebourn, 4th Magistrate, "Singapore, to show favour to him in connexion with 4th Magistrate Court Case No. 1571/55, and thereby dishonestly "attempted to induce the said Hou Suai Lian to deliver to you "the sum of two thousand five hundred dollars, and you thereby "committed an offence punishable under sections 420 and 511 of "the Penal Code (Cap. 119)."

The appellant was convicted on the second charge. She was acquitted by the trial judge on the first charge for reasons which their Lordships do not propose to discuss as no question as to the correctness of those reasons falls for decision on this appeal. But, whatever the reasons for the acquittal, it will be seen from what follows that the charge which arose directly from the facts spoken to by the witnesses was the first one. It may be regarded as the main charge. The grave offence alleged in it was that of attempting to obtain from an accused person a gratification as a reward for influencing a magistrate. The second charge makes the subsidiary allegation that the appellant attempted to cheat by making the representation that she could influence the magistrate. For the second charge to succeed it must be established both that she made the representation and that at the time of making it she did not believe it to be true.

In brief outline the prosecution evidence was to the following effect: On July 26, 1955, one Hou Say Lian was charged in the

Fourth Magistrate's Court with being in possession of prepared opium and smoking utensils. After some postponements the case was fixed for hearing on February 29, 1956. On February 25, 1956, Hou Say Lian accompanied by a friend Liang San Han met one Kok Min Yin by appointment. Kok Min Yin informed Hou Say Lian that he had been sent by the appellant to speak to him about the opium charge and that the appellant could help him. By arrangement Kok Min Yin took Hou Say Lian and Liang San Han on February 26 to the appellant's flat. She introduced herself as the wife of the Fourth Magistrate and showed them a photograph of herself with the magistrate's arm around her. She said that she could get an acquittal for Hou Say Lian for a sum of 3,500 dollars. Hou Say Lian said that he could not pay. There were some negotiations for a reduction of the amount, but no payment was made. The appellant warned him that if at least 2,500 dollars were not paid he would be fined 3,000 dollars by the court and would be sent to jail for six months. The next day Hou Say Lian was tried in the Fourth Magistrate's Court, convicted and sentenced to three months' imprisonment and a fine, in default a further three months' imprisonment.

On a search of the appellant's flat the police found, amongst other things, a visitor's permit to the General Hospital to visit the magistrate in question, a card relating to a change of address by him, and an invitation to a party given by him.

The trial court and the High Court held that the evidence established the facts mentioned, and their view of the evidence is not challenged on this appeal.

The evidence led by the prosecution, if accepted, would have sustained a conviction on the first charge. With regard to the second charge, it is not disputed that falsity of the representation made by the appellant that she could induce the magistrate to show favour was, under the relevant sections of the Penal Code of Singapore, a necessary ingredient of the charge. It will be seen that the evidence set out above failed to establish this ingredient. The magistrate himself, whose evidence was relevant upon this point, was not called. He was in attendance up to a certain stage of the proceedings. Defence counsel pointed out that he was about to leave the colony, whereupon the prosecuting officer said he did not desire to call him.

It was argued before the trial judge that the prosecution had failed to prove that the representation made by the appellant that she could influence the magistrate was false. He was of opinion that falsity and deceit had been established by reason of a statutory provision in the Singapore Evidence Ordinance. He said: "In my view I don't think it was necessary for the prosecution "to call Mr. Devereux-Colebourn as a witness to say that he "could not be influenced by the accused before the court could "be satisfied that there was deceit. Whether the accused could "or could not induce Mr. Devereux-Colebourn to show favour to "Hou Say Lian was a fact which was especially within the "knowledge of the accused and I was of the opinion that under "section 107 of the Evidence Ordinance (Cap. 4) it was not "necessary for the prosecution to prove deceit by calling Mr. "Devereux-Colebourn to say that the accused could not influence "him. The onus was on the accused to prove that she could "induce Mr. Devereux-Colebourn to show favour to Hou Say "Lian."

This view is erroneous. Section 107 of the Singapore Evidence Ordinance is to the following effect: "When any fact "is especially within the knowledge of any person, the burden "of proving that fact is upon him." This section is identical with section 106 of the Indian Evidence Act and with section 106 of the Ceylon Evidence Ordinance. The latter was considered by the Board in *Attygalle* v. *The King*,[1] in which two accused were prosecuted, the first for performing an illegal operation, the second for aiding and abetting him. The trial judge directed the jury thus[2]: ". . . ; that section says when any fact is "especially within the knowledge of any person, the burden "of proving that fact is upon him. Miss Maye"—that is the person upon whom the operation was alleged to have been performed—"was unconscious and what took place in that "room that three-quarters of an hour that she was under chloro-"form is a fact especially within the knowledge of these two "accused who were there. The burden of proving that fact, the "law says, is upon them, namely, that no criminal operation "took place, but that what took place was this speculum "examination."

Viscount Hailsham, delivering the judgment of the Board, said of this passage[2]: "Their Lordships are of opinion that "that direction does not correctly state the law. It is not the "law of Ceylon that the burden is cast upon an accused person "of proving that no crime has been committed. The jury might

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[1] [1936] A.C. 338; 52 T.L.R. 390; [1936] 2 All E.R. 116.

[2] [1936] A.C. 338, 341.

" well have thought from the passage just quoted that that was " in fact a burden which the accused person had to discharge."

It is clear, therefore, that by reason of the section no burden was placed upon the appellant in the present case to prove that there had been no deceit. The burden was upon the prosecution to prove affirmatively that there had been.

The learned judge of the High Court who affirmed the conviction does not uphold the view of the trial court on the effect of section 107. He makes no reference to that section. He bases himself on section 115 of the Evidence Ordinance, which was not referred to by the trial judge. This section is to the following effect: " The court may presume the existence of any " fact which it thinks likely to have happened, regard being had " to the common course of natural events, human conduct, and " public and private business, in their relation to the facts of the " particular case.

" Illustrations

" The court may presume—. . . (e) that judicial and official " acts have been regularly performed."

The section says that " The court may presume the existence " of any fact which it thinks likely to have happened " regard being had to certain things " in their relation to the facts of the " particular case." In this particular case what is the fact which the court could think is " likely to have happened " ? It may be argued that the presumption arises that, when the magistrate convicted Hou Say Lian, he was not influenced by the appellant. Assuming, without deciding, that this argument is correct, it does not help the prosecution because, according to the prosecution, she had not taken any money to influence the magistrate or undertaken for any other reason to influence him, and therefore the fact that he was not influenced is of no significance. As there is no other fact in aid of the prosecution which could be suggested was " likely to have happened," resort to section 115 fails to establish deceit. Further, even if it had been established not merely that the magistrate was not influenced but that he could not have been influenced, the inference of deceit does not necessarily arise. There is still left open the possibility that the appellant might have quite genuinely, though incorrectly, thought that she could have influenced the magistrate. In that case she would have been guilty of an error of judgment, not of deceit. Something more was necessary to establish deceit. It should have been made to appear sufficiently on established facts that the appellant had no reason to believe that she could have influenced the magistrate. This has not been done. The evidence of the magistrate would have been material on this point and it is remarkable that he was not called. The High Court observed: "Mr. Devereux-Colebourn, the magistrate involved, was present "at the trial but for some reason was not called by the prosecu-"tion. I might add that this was a very serious case involving "as it did, inter alia, the integrity of the Magisterial Bench, "and I am astonished that the prosecution was not conducted "by an experienced Crown counsel from the Attorney-General's "chambers rather than a police officer . . ."

With these remarks their Lordships agree. There were matters in this case which needed a full investigation and, even if it had been possible for the prosecution to rely on statutory presumptions to secure a conviction, the investigation should have taken place. Their Lordships are of opinion that section 115 cannot be relied on to establish deceit. It is not necessary for them in this case to examine the broader ground whether section 115, any more than section 107, can dispense with the necessity for proof by the prosecution of one of the principal ingredients alleged in the charge.

The appellant in the course of the proceedings on October 8 and 9, 1956, put in two written statements, which she was entitled to do under section 172 (1) of Criminal Procedure Code of Singapore (Cap. 132, Vol. III, Laws of the Colony of Singapore, p. 408). In one of them she gave a version entirely different from that given by the prosecution of what had happened and completely exculpated herself. She said that Hou Say Lian, Kok Min Yin and Liang did come to see her and asked her for her intervention with the magistrate to obtain an acquittal of Hou Say Lian. She said "I replied that I was in no position to do so and "that it was very wrong of them to have come to see me on a "matter of this nature." The High Court appears to regard these words as having a bearing on the question of proof of deceit. The trial judge made no reference to them. It is clear that if the exculpatory statement, as a whole, of the appellant were to be accepted she would have to be acquitted. The conviction therefore involved a rejection of the statement as a whole. Does the part of the statement quoted, properly regarded, possess any probative value? Their Lordships do not find it necessary to discuss here the effect of an unsworn statement put in under section 172 (1). It is sufficient to say that what was said in the sentence quoted is in direct conflict with the sworn testimony of witnesses who were regarded by both courts as truthful. The trial judge says: "I had no doubt that Hou Say Lian and Liang "San Han were truthful witnesses." Liang San Han said: "The accused did not say she had no influence with the Fourth "Magistrate. The accused did not say that we had no right to "go there and ask her to do such a thing." Hou Say Lian: "The accused did not say she could not influence the Fourth "Magistrate. Not true the accused refused to help me."

Their Lordships are of opinion that the words quoted must be regarded as having no probative value and could not be utilized either for or against the appellant.

It is not necessary to refer to the second statement the appellant put in under section 172 (1). The High Court regarded it as of no probative value and their Lordships are of the same opinion.

It has been repeatedly stated that the Judicial Committee is not a court of criminal appeal and it is now necessary to examine whether this is a case in which their Lordships should interfere. Every error of law would not justify an interference. It is clear that but for erroneous views of the courts below on the statutory presumptions earlier discussed the case against the appellant would, without doubt, have failed. There was in fact no evidence against her on a principal ingredient of the charge, namely, deceit. The case therefore comes within the range of cases in which their Lordships will interfere.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal be allowed, the order of conviction set aside and the appellant acquitted.

Solicitors: *Kingsley Wood & Co.; Charles Russell & Co.*

C. C.

[HOUSE OF LORDS.]

H. L. (E.)*

1957
May 6, 7, 8;
July 4.

SUN LIFE ASSURANCE SOCIETY . . APPELLANT;

AND

DAVIDSON (INSPECTOR OF TAXES) . . RESPONDENT.

PHOENIX ASSURANCE CO. LTD. . . APPELLANT;

AND

LOGAN (INSPECTOR OF TAXES) . . . RESPONDENT.

Revenue—Income tax—"Expenses of management"—Repayment of tax—Life assurance companies—Purchase and sale of securities—Brokerage and stamp duties—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 33 (1); *Sch. D, Cases I and II, r.* 3.

Two life assurance companies were assessed to income tax on their income from investments and not on their profits. The purchase, sale and changing of investments was part of their day-to-day business. They claimed repayment of so much of the tax paid by them as was equal to the amount of tax on the "sums disbursed as "expenses of management" in the terms of section 33 (1) of the Income Tax Act, 1918, which entitled such an assurance company "to repayment of so much of the tax paid by it as is equal to the "amount of the tax on any sums disbursed as expenses of management (including commissions)." The Crown objected to brokerage and stamp duties being included as such expenses. It was common ground that the expression "commissions" did not include brokerage:—

Held, (1) (unanimously) that sums paid in respect of stamp duties were not "expenses of management," and (2) (Lord Reid dissenting) that sums paid in respect of brokerage were not "expenses of management."

Both these items were part of the expenses of acquiring the investments, the price of which could not admittedly be classed as "expenses of management."

Capital and National Trust Ltd. v. *Golder* (1949) 65 T.L.R. 772; [1949] 2 All E.R. 956 applied.

Decision of the Court of Appeal [1956] Ch. 524; [1956] 2 All E.R. 642 affirmed.

APPEALS from the Court of Appeal (Singleton, Morris and Romer L.JJ.).

These were appeals from orders of the Court of Appeal dated May 17, 1956, dismissing appeals by the appellants, Sun Life

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD REID, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

Assurance Society and Phoenix Assurance Co. Ltd., from orders of the Chancery Division (Harman J.) dated November 2, 1955, whereby an appeal by the appellants from a determination of the Commissioners for the Special Purposes of the Income Tax Acts on a case stated by those commissioners was dismissed and their determination was affirmed.

In each case the matter arose on a claim by the appellant to repayment of income tax for the year 1949–50 under section 33 of the Income Tax Act, 1918, which grants relief to life assurance companies and others in respect of expenses of management. The question in dispute was whether sums disbursed by the appellants by way of brokerage and stamp duties in connexion with the purchases and sales of investments in the ordinary course of carrying on their trade of life assurance were "expenses of "management" within the meaning of section 33 (1) of the Act, which read as follows: "Where an assurance company carrying "on life assurance business, or any company whose business "consists mainly in the making of investments, and the principal "part of whose income is derived therefrom, or any savings bank "or other bank for savings, claims and proves to the satisfaction "of the special commissioners that, for any year of assessment, "it has been charged to tax by deduction or otherwise, and has "not been charged in respect of its profits in accordance with "the rules applicable to Case I of Schedule D, the company or "bank shall be entitled to repayment of so much of the tax paid "by it as is equal to the amount of the tax on any sums disbursed "as expenses of management (including commissions) for that "year: Provided that—(*a*) relief shall not be given under this "section so as to make the tax paid by the company or bank less "than the tax which would have been paid if the profits had been "charged in accordance with the said rules; and (*b*) the amount "of any fines, fees, or profits arising from reversions in the case "of an assurance company, and, in the case of any other com"pany or any such bank, the amount of any income or profits "derived from sources not charged to tax, shall be deducted from "the amount treated as expenses of management for the year; "and (*c*) in calculating profits arising from reversions, the com"pany may set off against those profits any loss arising from "reversions for any previous year during which any enactment "granting this relief was in operation."

The facts are fully stated in the opinion of Viscount Simonds.

SUN LIFE ASSURANCE SOCIETY *v.* DAVIDSON (INSPECTOR OF TAXES)

Charles Russell Q.C., *F. N. Bucher Q.C.* and *John Creese* for Sun Life Assurance Society. The sums disbursed by the appellants in brokerage and stamp duties on purchases and sales of investments are part of the expenses of management of their business. They challenge the applicability of *Capital and National Trust Ltd.* v. *Golder*[1] to the present case and also its ratio decidendi, although, for another reason, the decision itself may have been right. It is distinguishable from the present case. The relief was first introduced by section 14 of the Finance Act, 1915. It was subsequently enacted by section 33 of the Income Tax Act, 1918, the relevant section here.

The origin of the expression " expenses of management " is to be found in the statutory form prescribed in Schedule I of the Assurance Companies Act, 1909. It was incorporated in that Act from earlier Acts. This form, that of a revenue account, distinguishes between " commission " and " expenses of management," placing them under separate headings. All disbursements fall under one head or the other.

The words in section 33 (1) of the Act of 1918 which must be construed are " expenses of management (including commis- " sions)." It is agreed that " commissions " there does not include brokerage; it refers to payments to agents who obtain business. The phrase " expenses of management " is not a term of art and has no particular technical meaning. One is dealing with sums disbursed by the company, and " management " refers to the management of its business or trade. Thus the phrase means " any sums disbursed by the company as expenses of the " carrying on of its business." The definitions of " manage " in the Oxford English Dictionary include " to handle "; " to " conduct or carry on (a war, a business, an undertaking, an " operation) "; " to conduct and direct the affairs of (a household, " institution, state, etc.)." And " management " is defined as " the action or manner of managing in senses of the verb." This is illustrated by a quotation dated 1601: " Those . . . expences " which are daiely laide out . . . for the managements of so many " warres."

If part of the business of a company is to trade in shares, it must carry through the sale of the shares, and so the expense of carrying through that sale must be an expense of management. It is sound management to employ and remunerate a stockbroker and to see that the contract is duly stamped so that it is admissible in evidence. To do otherwise would be bad management. Management includes the management of the assets represented by the stocks and shares.

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[1] (1949) 65 T.L.R. 772; [1949] 2 All E.R. 956.

The function of the company is to buy and sell stocks and shares; that is its trading activity. If it does this through a stockbroker, it pays his remuneration. All the expenses incurred in putting the transactions through must be incurred in the course of the management of the business of the company, i.e., in carrying on that business. If the company ventured to put through a purchase without a stockbroker's help, it might be grossly mismanaging the business; therefore it must be in the course of management that a stockbroker is employed. The price includes a number of liabilities (e.g., purchase tax), but if one buys shares on the Stock Exchange, the owner is not concerned with anything but the price paid to him. He is not concerned with whether the purchaser pays his own servant or a stockbroker to effect the transaction.

Management is not confined to the principals who wear top hats, but relates to the conduct of the business. The expenses of management are the same as the expenses of conducting the business. Stamp duty and postage are management expenses, and so are stamps on cheques. If an outlay is not price, it is an expense of management. Everything spent by the company is a management expense unless it falls within certain limited classes of expenditure, like payments to policy holders and the purchase price of investments acquired by the company as part of its capital, although such an expense might be included if, and to the extent to which, it was represented by an asset of the business. Admittedly money spent on enhancing the value of a trading asset is not an expense of management. Buying is replacing one asset by another, but that is not true of services paid for. Here the phrase "expenses of management" is only being considered in the context of section 33, and in that context payment for services, whether calculated on a percentage basis or agreed at a flat rate, is a management expense. The appellant company accepts the approach of Harman J.[2] to the construction of the words. But the question is not, as put in the case stated, "whether brokerage and stamp duty must be regarded as so "closely connected with the transaction of purchase that they "equally with the purchase price are expenses incurred by the

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[2] [1956] Ch. 524, 530; [1955] 3 All E.R. 552.

"management in carrying out the business of the society rather "than expenses of management of that business." The courts below were wrong in holding that *Capital and National Trust Ltd.* v. *Golder*[3] governed this case, because the facts there were materially different. Further, the reasoning in that case was incorrect in distinguishing between expenses incurred in shaping policy and in other matters of managerial decision, on the one hand, and expenses incurred at lower levels of the company's structure on the other. That case was either wrongly decided or decided on the basis of wrong reasons. If the company's investments are regarded as fixed capital, the expenses of changing them are a capital outlay and so outside the orbit of a section allowing expenses for income tax purposes.

The purchase price of an article is not an expense of management in the context of section 33 because, in dealing with a section such as this, it would be absurd to bring in the actual purchase price as an allowance where there is no provision (as in this section there is not) for also bringing in the contra, viz., what has resulted from the purchase. But one does not add anything to the value of the share by paying brokerage or stamp duty. These are like staff's salaries and postage, which are clearly management expenses.

If management is something different from the conduct of the business, it is hard to see where to stop, whether at the board of directors, or at the people called managers, or at supervisors. The proper interpretation is to say that management means the conduct of the business. If it were said that "expenses of "management" means overheads, one would reach the absurdity that a fee to one doctor for examining an applicant for life assurance would not be allowable, while the salary of a "tame" doctor examining all applicants would be allowable. One would not be able to include an expense referable to one particular transaction.

The expenses here in question are indistinguishable from others amounting to £750,000 which the Revenue have allowed. To disallow them would be to prepare the way for disallowance in the future of claims hitherto admitted. The Crown should make clear where it draws the line.

The object of section 33 is stated in *Simpson* v. *Grange Trust Ltd.*[4]: see Harman J. in the present case[5] and also Romer L.J. There is also cited by Romer L.J. the review of the business of insurance in *Liverpool and London and Globe Insurance Co.* v. *Bennett.*[6] As to the meaning of " expenses of management," Morris L.J.[7] referred to three cases: *Rosyth Building and Estates Co. Ltd.* v. *Rogers*,[8] *Southern* v. *Aldwych Property Trust Ltd.*[9] and *London County Freehold and Leasehold Properties Ltd.* v. *Sweet.*[10] The phrase " expenses of management " has no technical meaning: see *North British & Mercantile Insurance Co.* v. *Easson*,[11] referred to by Morris L.J.[12] See also *Bennet* v. *Underground Electric Railways Co. of London Ltd.*[13]

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[3] 65 T.L.R. 772.

[4] [1935] A.C. 422; 51 T.L.R. 320.

[5] [1956] Ch. 524, 529, 538; [1956] 2 All E.R. 642.

F. N. Bucher Q.C. following. The draftsman of section 33 (1) of the Act of 1918 took the words " expenses of management " from the Schedule to the Assurance Companies Act, 1909, but proviso (*a*) to section 33 (1) shows that he had in mind the kind of expenditure admissible in a trading calculation under Case I of Schedule D, and also that he recognized that the expression is not necessarily narrower in its effect than the kind of trading expenditure admitted under Case I of Schedule D. Therefore the expression is apt to cover all such expenditure except where the expenditure produces a contra item for which no provision is made in the calculation by section 33 (1).

Sir Reginald Manningham-Buller Q.C., A.-G., Roy Borneman Q.C. and *Sir Reginald Hills* for the Crown. Brokerage paid to stockbrokers and stamp duties are not expenses of management. *Capital and National Trust Ltd.* v. *Golder*[14] was rightly decided and should be followed. Section 33 of the Act of 1918 deals with three categories of companies: assurance companies, investment companies and savings banks. The right to relief is not related to the conduct of the trade or business. It is not affected by considerations of whether or not a company could be assessed under Case I of Schedule D, which is not referred to in section 33. The content of the expression " expenses of management " in the context of section 33 is different from that of the disbursements and expenses which by implication from rule 3 (*a*) of the Rules applicable to Cases I and II of Schedule D are allowable as deductions in ascertaining trade profits, viz., any expenses incurred " wholly and exclusively for the purposes of the trade."

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[6] [1913] A.C. 610; 29 T.L.R. 757.

[7] [1956] Ch. 524, 546.

[8] 1921 S.C. 372; 8 T.C. 11.

[9] [1940] 2 K.B. 266; 56 T.L.R. 808.

[10] (1942) 58 T.L.R. 281; [1942] 2 All E.R. 212.

[11] (1919) 7 T.C. 463.

[12] [1956] Ch. 524, 546.

[13] [1923] 2 K.B. 535; 39 T.L.R. 560.

[14] 65 T.L.R. 772.

H. L. (E.)
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"Expenses of management" are less than this, and the expression is contrasted with the expenses, defined in decided cases, as deductible in ascertaining trade profits for income tax purposes.

A private person is not entitled to repayment of tax paid on investment income because of expenses incurred in relation to the investment. A colliery company which after nationalization carried on no business but only invested the compensation which it received would not be entitled to invoke section 33 in relation to the transactions of investment: see *Inland Revenue Commissioners* v. *Butterley Co. Ltd.*[15]

Parliament granted this relief because it appreciated that companies of this kind incurred particular expenses in earning their income. The expenses in question must be expenses of the company, but not all its expenses. The appellants' definition of "expenses of management" would cover all expenses, save perhaps expenses incurred with a capital object and money paid in exchange for an asset. If that were so, the last two words of the phrase "expenses of management" would be otiose. Those words must mean that not all expenses of the company are included. They must be words of limitation or else they mean nothing. If it were possible to have a capital expense of management (which is doubtful), there would be nothing in section 33 to exclude it.

Much of the difficulty in this case results from confusing the taxation of a trade with tax-free payments obtainable in relation to investment income. Rule 3 was in existence long before the predecessor of section 33 was enacted in 1916, and if Parliament had then intended to provide more extensive relief it could easily have done so: see *Simpson* v. *Grange Trust Ltd.*[16] The relief under section 33 is not co-extensive with the relief under rule 3. Section 33 gives relief in respect of some, but not all, of the company's expenses. If the expression "expenses of management" is given its natural meaning, it is unnecessary to consider whether any particular expense is capital or not. The words must have their ordinary natural meaning without a gloss. Expenses of management are wholly different from production and selling expenses. The expenses of management in an industrial concern must be less than the whole expenses. That is the case also in a commercial company. In relation to companies within section 33 the same sense must also be attached to the expression: see *Inland Revenue* v. *Wilson's Executors.*[17] Management means administration, but the expression is not as narrow as the expenses of the board of directors or of the heads of departments. The natural meaning is that part of the expenses related to the sphere of administration or management, but it does not cover all the expenses of carrying on the whole business or trade of the company under the management. The decision of a commercial company to buy so many tons of fruit as a matter of policy would be management, but sending out the people to buy them would not be management. There is a distinction between the managerial decision and carrying it out in individual cases. Paying brokerage and stamp duty cannot be regarded as part of management. In section 33 there is no such qualification as the appellants suggest. Further, it is not the case that, if the profits were assessed under Case I of Schedule D, brokerage and stamp duties could be deducted in the year in which they were incurred.

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[15] [1957] A.C. 32; [1956] 2 All E.R. 197.

[16] [1934] 2 K.B. 317, 333; 50 T.L.R. 389; [1935] A.C. 422, 425; 51 T.L.R. 320.

The Crown does not contend that the expression "expenses "of management" should be construed merely as the expenses of the managers of the company. It must, however, be related to management. It is not for the Crown to draw the line in this case, since it is only concerned with the items now challenged. The line may be hard to draw in some cases. Moreover, the cost of effecting an actual purchase of goods cannot be an expense of management, nor can the cost of transport—the cost of sending lorries to collect the goods. So, too, wherever the line should be drawn, the expenditure here in question is so closely linked with the purchase and sale of the investments that it cannot be an expense of management: see *Inland Revenue Commissioners* v. *Millwards Merchandise Ltd.*[18]

If the appellants were right, *Bennet* v. *Underground Electric Railways Co. of London Ltd.*[19] should have been decided the other way, but it was rightly decided.

The meaning of "expenses of management" cannot be expanded to include the expenses incurred by the management in carrying on the company's business. That is a gloss on the words, which they will not stand. In illustration of the distinction which the Crown draws, the engine driver and the guard of a railway train are not managing the railway, but a stationmaster may be.

[17] 1934 S.C. 244, 249–250; 18 T.C. 465, 472–473.

[18] (1929) Excess Profits Duty Leaflets No. 170.

[19] [1923] 2 K.B. 535.

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Roy Borneman Q.C. following. The expression "expenses "of management" is a phrase of limitation directing the mind to the functions and process of management. They include the expenses of the managing director and the board of directors and (for instance) the wages of the "Mrs. Mopp" who looks after their rooms. They also include the expenses of the "back room" people and of the functions of management at all its levels. It is a question of degree whether any given expense is sufficiently proximate to the functions of management or is too remote. A rough arbitrary division might be made between the expenses in the trading account and those in the profit and loss account for the purpose of testing what is or is not a function of management. The payment of stamp duties is nowhere near being sufficiently proximate to the functions of management. Brokerage is not so remote, but it is still too remote. By the time the broker is doing his work, the functions of management are spent. In one report of the judgment of Rowlatt J. in *Bennet* v. *Underground Electric Railways Co. of London Ltd.*[20] there is a convenient and graphic phrase which fits this case: "If they can do it on favourable "terms it does not mean that the management is costing less; "and if they do it on unfavourable terms the management is "just the same. . . . That is not management; that is buying "what they want."

F. N. Bucher Q.C. in reply. There is no difference in kind between payments to a commission agent and payments to a stockbroker. There is admittedly a stronger case for regarding brokerage as an expense of management than for so regarding stamp duties. In construing section 33 one must give their full force to the words "any sums disbursed as expenses of manage-"ment (including commissions)," which must be construed in their ordinary sense. See its predecessor, section 14 of the Finance Act, 1915, and also sections 12, 13 and 21 (2). It is inconceivable that the draftsman of this Act and of the Income Tax Act, 1918, should not have looked at the Assurance Companies Act, 1909. The object of section 33 is expressed in *Simpson* v. *Grange Trust Ltd.*[21] and the Crown's contention runs counter to it. The appellants' contention is not contrary to the decision in *Bennet* v. *Underground Electric Railways Co. of London Ltd.*[22]

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[20] 129 L.T. 701, 704.

[21] [1935] A.C. 422, 425.

[22] [1923] 2 K.B. 535, 537.

PHOENIX ASSURANCE CO. LTD. *v.* LOGAN (INSPECTOR OF TAXES)

F. H. Talbot Q.C. and *S. M. Young* for Phoenix Assurance Co. Ltd. In the case of a life assurance company the phrase "expenses of management (including commissions)" comprises all outgoings chargeable to the life funds except (1) claims, surrenders, annuities and bonuses, and (2) disbursements represented by assets of the funds. The critical words are "sums disbursed "as expenses of management (including commissions)." The Act is referring to the revenue account of the life fund of an assurance company. When the Finance Act, 1915, used the phrase "expenses of management" it had been on the statute book for 45 years in relation to assurance companies and its meaning was well accepted. The Assurance Companies Act, 1909, was largely a re-enactment of the Life Assurance Companies Act, 1870, in which the expression "expenses of management" occurs in the Schedules. In Schedule I of each Act, representing a revenue account, the three main heads are repeated, (1) annuities, (2) amount of fund at the end of the year, and (3) commission and expenses of management. It would be wrong accounting to put brokerage and stamp duty among the funds at the end of the year, because it would be inflating that figure beyond its true realizable value. In the Act of 1918 these items were intended to be included in "expenses of management" and they were long dealt with in that way. Although the phrase is not a term of art in the general sense, it has a special content in this connexion. If these items did not fall under the heading "expenses "of management," they would have to be put under the head "other payments," a head inappropriate to such important items. These items did not increase the realizable value of the assets and it is not wrong to charge them as "expenses of "management" in the revenue account.

Roy Borneman Q.C. and *Sir Reginald Hills* for the Crown. The arguments already submitted in the previous case are adopted in this one too, since it is indistinguishable.

The claim in both cases involves putting a gloss on the words "expenses of management" to extend them to mean "expenses "of conducting the business of the company." There is no adequate reason for such a gloss. An analysis of the Acts of 1870 and 1909 does not advance the matter. One must still answer the question: What is meant by "expenses of management"? In the Schedule the head "other payments" is a sweeping-up phrase and is very apt to include brokerage and stamp duties.

F. H. Talbot Q.C. in reply. The appellants are not seeking to put a gloss on the words.

Their Lordships took time for consideration.

July 4. VISCOUNT SIMONDS. My Lords, this and the succeeding case, *Phoenix Assurance Co. Ltd.* v. *Logan*, raise a question of general importance to life assurance and some other companies. It is whether sums disbursed by them by way of brokerage and stamp duties in connexion with the purchase and sale of investments in the ordinary course of carrying on their business are expenses of management in respect of which they are entitled to relief under section 33 (1) of the Income Tax Act, 1918. That subsection provides: [His Lordship read the subsection and continued:] The claim immediately under consideration is made by the appellant society in respect of the year of assessment 1949–50 and is for repayment of tax equal to the amount of tax paid on £40,773, being sums disbursed by it for brokerage and stamp duties on the sale and purchase of investments. The claim has been rejected by the Commissioners for the Special Purposes of the Income Tax Acts and by Harman J. and the Court of Appeal.

The relevant facts are fully set out in a case stated by the Special Commissioners for the opinion of the court. I can refer to them shortly. The appellant society carries on the business of life assurance, which is a trade for the purpose of the Income Tax Acts. Its profits are therefore assessable under Case I of Schedule D of the Income Tax Act, 1918, but no such assessments have been made because the Crown has elected to charge it not upon its trading profits but upon its income from investments. It is bound by section 3 of the Assurance Companies Act, 1909, to keep, and has always kept, a separate account of all receipts from its life assurance business and those receipts have been carried to and form a separate fund known as the life assurance fund.

The maintenance of this fund is clearly of great importance to the society. I quote from the case: "The business of life "assurance is highly competitive. It is therefore essential that, "in order to keep its premiums as low as possible, the society "should invest its premiums to the best advantage and, as "necessary, change the investments from time to time. More- "over it is necessary that the premiums should be invested to "earn a rate of interest sufficient to meet the society's obligations "under its policies as well as to provide profits for the benefit of "participating policy holders and of shareholders. . . . Thus in "the ordinary course of carrying on its business it is necessary "for the society to purchase investments and from time to time "to sell or change such investments. The investments made by "the society are part of its circulating capital and do not con- "stitute part of its fixed capital assets. In order to carry out "the day-to-day work in respect of the investment and reinvest- "ment of its moneys in the life assurance fund the society has "a special staff of employees in the investment department. "This department is concerned with buying investments quoted "on the Stock Exchange and also with investing the society's "money privately, that is, not through the agency of members "of the Stock Exchange. In addition the society makes invest- "ments by advancing moneys at interest to policy holders on the "security of their policies."

It would seem, therefore, that the society did not in the case of every investment have to pay brokerage, nor presumably did it in the case of an original subscription for stock or shares have to pay transfer stamp duty, but I do not think that this throws any light on the question whether when such charges were payable they were "expenses of management."

The society's right to relief cannot depend on the way in which it chooses to treat these payments in its books, but it is a matter to which reference has been made and I therefore quote again from the case: "In the books of the society the sums paid "or suffered as brokerage and stamp duties on the purchase or "sale of investments in the year ended December 31, 1949, were "charged to a general expenses account. In the revenue of the "life assurance business of the society for that year drawn up in "the form prescribed by section 4 (*a*) and Schedule I to the "Assurance Companies Act, 1909, the said sums are included in "the amount debited for expenses of management. Any profits "arising on the realization of investments are passed to inner "reserves and by virtue of a directors' resolution are reserved for "policy holders. . . . The accounts of fifty-six assurance com- "panies had been examined by Mr. Wardrop (one of Her "Majesty's Senior Principal Inspectors of Taxes) who ascertained "that in the case of forty-eight of them the amounts expended "on brokerage and stamp duties in connexion with purchases "and sales of investments were in the case of purchases, treated "as part of the costs of acquiring the investments in question "and in the case of sales, were treated as deductions from the "proceeds of sales. Nevertheless, when computing their claim "under section 33 all such forty-eight companies included such "brokerage and duties as part of their expenses of management. "In the case of the remaining eight companies the amounts so "expended were from the beginning charged as expenses in the "revenue accounts of the respective life assurance businesses." I have thought it right to mention this matter but, as I have said, it is plainly irrelevant to the issue.

Nor, in my opinion, can greater importance be attached to the fact that it was only in 1949 that the claim of the appellant society to relief in respect of these charges was first refused. It is a fact which should deter me from saying what I otherwise might, that the matter is very clear; but it would be contrary to all experience to say that the Inland Revenue authorities cannot grow inveterate in error in granting as in refusing relief. I do not allow my judgment to be influenced by their previous willingness to grant this relief.

Nor, again, can I get much help from an argument forcefully pressed by learned counsel for the appellant society that the Inland Revenue authorities have allowed other claims for disbursement in respect of a large number of items amounting to about £750,000, but have challenged these claims which, as they alleged, were indistinguishable in quality; thus they say the way would be paved to a disallowance of other claims formerly admitted. The learned Attorney-General was in effect therefore invited to say where he proposed to draw the line and which, if any, of the items previously allowed he intended in the future to challenge. But he was, I think, well entitled to answer that he was concerned only with the items that had in fact been challenged and that future action might well depend on the decision given in this House in regard to them. It is, in fact, very clear that an expression like "expenses of management" is insusceptible of precise definition and that there must be a borderline or twilight area in which a conclusion one way or the other could easily be reached. That does not mean that there is not on either side of it an area of sunshine and of darkness.

The question is, then, whether these particular charges are expenses of management. I have so far ignored the fact that these words have in the section an appendage "(including "commissions)." It has been assumed on both sides that "commissions" here refers to the payment made to the agent who obtains business for his society and does not include the

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brokerage payable to a stockbroker, which is often called commission. I am content, without deciding it, to make the same assumption. Under these circumstances, I do not get any help from these words. "Commission" may be expressly included either because it would otherwise not be included or in order to make clear what might otherwise be in doubt. No light is thrown on what else is comprised in expenses of management.

Counsel for the appellant society further supported their submission by reference to the origin of the expression "expenses "of management." It is to be found in the statutory form prescribed in Schedule I to the Assurance Companies Act, 1909, and had in fact been incorporated in that Act from earlier Acts. The form which is that of a revenue account contains (inter alia) two headings of deduction, viz., (1) "commission," (2) "expenses of "management." But I cannot infer from this that all disbursements made by the society must fall under one or other of these headings. That would be to ignore both the fact that there is a third heading "Other payments (Accounts to be specified)" and the fact that as a matter of accounting such disbursements need not be and generally are not included in the item "expenses of "management."

The Special Commissioners in disallowing the claim expressed their opinion in a way that I find helpful. "We have come to the conclusion," they said, "and we so hold that the brokerage "and stamp duties payable on the purchase of an investment "being not general expenses of conducting the society's business "but expenses specifically referable to and only incurred by "reason of the purchase, are expenses of the purchase and not "expenses of management. If we draw a line between the "moneys admittedly laid out by the society for expenses of "management and the moneys laid out for the price of an "investment, we hold that the brokerage and stamp duties fall "on the same side of the line as the latter. The fact that the "purchase is necessarily made in the ordinary course of carrying "on the society's business does not of itself determine whether "the sums in question are expenses of management of that "business. In our view the disputed items are so closely linked "with the transaction of purchase (being necessarily incurred in "the course thereof) as to be considered part of the expenses "of the purchase and not expenses of management of the "society's business. We also hold that the brokerage and stamp "duties paid by the society on the sale of an investment are not "expenses of management."

The Special Commissioners have recognized what I think is of first importance in interpreting the words in question, namely, that they are words of qualification or limitation. It is not all the expenses incurred by the society; it is not their trading or general expenses which are deductible. The society is not being assessed on its trading profits under Case I of Schedule D: on the contrary a special method of assessment is prescribed and language is used which makes it clear that some only of the expenses which would be deductible under Case I and the relevant rules are deductible under this special method. Counsel for the society, though they contended that the expenses of management were the same as the expenses of conducting, carrying on or running its business, yet conceded that some qualification must be introduced and, quite illogically as it appeared to me, admitted that there could not be included in such expenses the cost of purchase of the investments themselves. I do not know why not, for the acquisition of the necessary stock in trade would appear to be a first expense of carrying on a business. A further refinement was, indeed, introduced and it was said that such an expense could only be excluded if, and to the extent to which, it was represented by an asset of the business. I do not follow and cannot give effect to this argument. The concession is nevertheless of value, for, if the expense of purchasing an investment is not an expense of management, I can see no valid ground of distinction between the price of the stock which is purchased and the stamp duty paid upon contract or transfer and the brokerage paid to the broker. Each item is an integral part of the cost of acquisition or, as the commissioners put it, a part of the expenses of the particular purchase not of the expenses of management. This is perhaps even more clearly seen upon a sale than upon a purchase of an investment, for in that case there is no disbursement at all but only a diminution of the sum received by the society.

Harman J. who would, but for the authority of *Capital and National Trust Ltd.* v. *Golder*[1] to which I will again refer, have been disposed to allow the appeal from the Special Commissioners so far as it related to brokerage, distinguished between that expense and the expense of stamp duties. But it appears to me that the same reasoning applies with equal force to each expense. I agree with him[2] that the payment of stamp duty is "imposed "by the State by way of taxation and may truly be said to be

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[1] (1949) 65 T.L.R. 772; [1949] 2 All E.R. 956.

[2] [1956] Ch. 524, 531; [1955] 3 All E.R. 552.

"part of the cost of each transaction to the company and be "treated as such." But, if the machinery of the Stock Exchange is used for the purchase or sale of investments, the payment of brokerage is imposed by its rules and is equally part of the cost of each transaction.

The same doubts were expressed in the Court of Appeal, but in that court, too, *Golder's* case [3] was regarded as an authority which was decisive in favour of the Crown. And so I think it was. For in *Golder's* case [3] the Court of Appeal, affirming the judgment of Croom-Johnson J., had held that charges for brokerage and stamp duties incurred by an investment company were not expenses of management within the section and had so held on grounds which were no less applicable to a life assurance company than to an investment company. It was suggested that the decision could be justified on a ground not present in the instant case, viz.: that the payments there made had the quality of capital expenditure. It may be so, but that was not the ground of decision. The judgment of Croom-Johnson J. has been closely criticized and, verbally, at least, it is open to some criticism, but I think that the broad ground of his decision is precisely that of the Special Commissioners, that the price of the shares, the brokerage and the stamp duties are several parts of the cost of acquiring or disposing of an investment and cannot, the one more than the other, be regarded as expenses of management. I would here interpolate that, though in the case stated reference is made to a fundamental difference between the nature of the businesses carried on by a life assurance company and an investment company respectively, I agree with Romer L.J. in thinking that there is no relevant distinction between the disbursement in the one case and the other.

There is little other authority upon the meaning of the relevant words, but I get some assistance from a decision of Rowlatt J. in *Bennet* v. *Underground Electric Railways Co. of London Ltd.*[4] The company having to raise capital abroad, issued bonds which were payable in sterling in London or in foreign currency at a certain rate of exchange. In the event, in order to comply with its obligations, the company had to buy foreign currency and, suffering a loss in doing so, claimed that the loss was an expense of management. In language, of which I seemed to hear an echo in this case, counsel urged that the company in order to manage its business properly had to offer to pay its foreign creditors in their own country and currency, therefore the cost of exchange was an expense of management. Rowlatt J. rejected the claim: he pointed out that the reason why the company had suffered a loss was because in order to carry on its business it had to provide itself with money in New York and Amsterdam and, as it did not have money lying there, it had to buy it at a high rate of exchange: that, if the company had been able to obtain the needed currency on favourable terms, its management would not have cost less, and, if, as it happened, it could only obtain the necessary money on unfavourable terms, its management could not be said to have cost more: in either case the cost of management was the same.

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[3] 65 T.L.R. 772.

[4] [1923] 2 K.B. 535; 39 T.L.R. 560.

It could be said of this decision that, though the learned judge very incisively said that the loss incurred in the purchase of foreign currency was not an expense of management, his reason for saying so, viz., that the cost of management remained the same, really involved a petitio principii. For the cost of management could only remain the same if the loss was not an expense of management. But the value of the case lies in the reaction of a very learned judge to the argument that an expense necessarily incurred in order to carry on a business properly is therefore an expense of management. And, if on an analysis it would seem that, in effect, the learned judge said: "This is not "an expense of management because it is not an expense of "management," I should not give any less weight to his authority. He did not attempt to define management in this context: to him the plain English word could not properly extend to cover such a payment, and at the end of the day I doubt whether any more cogent reason can be given. In the present case I differ with reluctance from the opinion of the late Singleton L.J. He took the view that (I quote his words)[5]: "If "the purchase is part of the ordinary day-to-day business of the "society it is difficult at first sight to see why something which "the society has to pay in order to carry out the purchase is not "an expense of the ordinary running of the society's business. It "is argued that the expenses of management end when a decision "is made to buy, and thus that the cost of stamp or brokerage "which takes place later is not an expense of management. "That cannot be right, for someone on behalf of the society has "to receive and check the securities, and the broker is under the "duty of seeing to the transfers and forwarding the securities. "That is a part of his work in return for the remuneration he

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[5] [1956] Ch. 524, 544; [1956] 2 All E.R. 642.

"receives by way of brokerage or commission. It seems to me "to be impossible to split up the transaction in this way: to do "so is to depart from common sense."

The case is thus put by the learned Lord Justice as cogently as it can be put. But it is, I think, vitiated by the initial mistake that he regards "management" as equivalent to running the company's business in a wide and almost colloquial sense. If it had this meaning, it would cover the price of the investment equally with the brokerage and stamp duties. But ex concessis it does not and I would say, with the greatest respect, that it would be to depart from common sense to treat the three constituents of the cost of purchase differently.

I am of opinion that the appeal should be dismissed with costs.

In the case of *Phoenix Assurance Co. Ltd.* v. *Logan* the appeal raises the same question as the preceding case and the relevant facts are not distinguishable. In my opinion, the appeal should be dismissed with costs.

Lord Morton of Henryton. My Lords, the sole question in dispute on this appeal is whether certain sums disbursed by the appellant society by way of brokerage and stamp duty in connexion with purchases and sales of investments, in the ordinary course of carrying on its business of life assurance, are "sums disbursed as expenses of management (including com-"missions)" within the meaning of section 33 (1) of the Income Tax Act, 1918. That section has already been read.

Counsel for the society contended that the sums in question were "expenses of management." They did not contend that the sums paid by way of brokerage were "commissions" within the meaning of the section. For my part, I am not satisfied that the sum paid to a stockbroker on the purchase or sale of an investment is not a commission within the meaning of the section, but I express no opinion on the point, as it has not been argued. The result is that I have to form an opinion as to whether brokerage and stamp duty, which are obviously expenses of the society, fall into the category of "expenses of manage-"ment" or into the category of other expenses of the society.

It has been common ground between the parties throughout all courts that "expenses of management" do not include the price of investments bought by the society in the course of its business. Now it is clear that the sums now in question are not part of the *price*, for the price of an investment, purchased or sold, is the sum which is paid by the purchaser to the seller.

These expenses are, however, so closely linked with the transaction of purchase that they may naturally be considered as items in the total *cost* of a purchase which has already been resolved upon by the management of the company, and not as expenses of management. This is the short and simple ground upon which the Special Commissioners decided the case in favour of the Crown, and I have arrived at the conclusion, though with considerable doubt, that it is a sound ground. Until the year 1949–50, with which this appeal is concerned, the Crown had always admitted the claim to deduct these sums as expenses of management in the case of life assurance societies. The Crown had followed a similar line in the case of investment companies until the previous year, when the Court of Appeal decided in the case of *Capital and National Trust Ltd.* v. *Golder*[6] that in the case of those companies these sums could not be deducted as expenses of management. In the present case Harman J. and the Court of Appeal thought that *Golder's* case[6] was indistinguishable from the present case and they therefore followed it; but Harman J. and two members of the Court of Appeal indicated that they would have decided otherwise had they been free to do so.

My Lords, I agree with both courts that *Golder's* case[6] cannot be distinguished from the present case. It seems to me that the transaction carried out on the sale or purchase of an investment is exactly the same, whether the company carrying it out is an investment company or a company such as the society. It is true that in *Golder's* case[6] the investments formed part of the fixed capital of the Capital and National Trust Ltd., whereas in the case of the society, to quote the case stated " the investments " are part of its circulating capital and the purchases and sales " of investments are made in the ordinary course of carrying on " its day-to-day business activities." This difference, however, does not seem to me to affect in any way the nature of the transactions carried out in buying and selling investments or the nature of the payments made to stockbrokers or to the Revenue on the occasion of such sales or purchases.

In my opinion, *Golder's* case[6] was rightly decided, but I cannot accept all the reasons given by Croom-Johnson J. and the Court of Appeal for their decision. The reason why I am of opinion that *Golder's* case[6] was rightly decided is the short and simple reason given by the commissioners, which I have already quoted.

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[6] 65 T.L.R. 772.

Lord Morton of Henryton.

My Lords, having formed the view which I have already expressed, I am fortified by the fact, which appears in the stated case, that, out of 56 assurance companies whose accounts had been examined by Mr. Wardrop (one of Her Majesty's Senior Principal Inspectors of Taxes) 48 companies treated the amounts expended on brokerage and stamp duties in connexion with purchases and sales of investments, in the case of purchases, as part of the costs of acquiring the investments in question and, in the case of sales, as deductions from the proceeds of sales. I could not, however, regard this fact as of any weight in arriving at a decision, especially as in the case of the remaining eight companies the amounts so expended were from the beginning charged as expenses in the Revenue accounts of their respective life assurance businesses.

I would add two comments. First, that, if I had been persuaded that brokerage was covered by the expression "expenses of management," I should still have inclined to the view that stamp duties were not so included. Secondly, although I would decide this appeal in favour of the Crown, I do not accept the very narrow view of the words "expenses of management" which was put forward by the Attorney-General.

I think that these words should be given a wide construction, for the reasons about to be given by my noble and learned friend Lord Somervell of Harrow.

I would dismiss the appeal.

In *Phoenix Assurance Co. Ltd.* v. *Logan* counsel agreed that the case could not be distinguished from *Sun Life Assurance Society* v. *Davidson.* I would dismiss the appeals for the reasons which I have given.

LORD REID. My Lords, we have to construe the phrase "sums disbursed as expenses of management (including commissions)" in section 33 of the Income Tax Act, 1918. The relief afforded by this section was first given in 1915 and I think that one can properly assume that the draftsman had regard to the fact that "expenses of management" and "commission" were items in the statutory form of accounts of life assurance companies provided by the Assurance Companies Act, 1909, and the Life Assurance Companies Act, 1870. But the relief given in 1915 was not limited to assurance companies; it was also given to investment companies and savings banks to which the Acts of 1909 and 1870 did not apply. And the combined phrase "expenses of management (including commissions)" is not the same as the separate items "expenses of management" and "commission" in the earlier Acts. So I do not think that one can solve the present question simply by considering whether the two items now in dispute—brokerage or commission paid to stockbrokers and stamp duty on transfers—ought to be included in one or other of the items "expenses of management" and "commission" in the appellants' statutory accounts. One must take the words in section 33 and read them in their context in the light of the apparent general object of the section.

A trading company such as the appellants may receive a large part of its income in the form of dividends out of which tax is payable by deduction or otherwise. Tax payable in this way may exceed the amount of tax which the company would have had to pay if the Crown had chosen to assess it under Case I of Schedule D. In calculating taxable profit under Case I the taxpayer can deduct a wide variety of expenses, but, before 1915, if the Crown did not choose to proceed under Case I the trader had no right to deduct any expenses but must, like any other taxpayer, pay the whole tax deductible from dividends received. Apparently this was thought to be unjust and the relief was given which is enacted in section 33. Section 33 does not apply to all traders, perhaps because the problem only arose acutely in the case of the three classes mentioned in the section. But it is less easy to understand why the relief under section 33 is extended to certain companies which do not engage in trade and to which the above-mentioned reason does not apply. They are given a preference over individuals who derive their income from investments, and indeed the relief to them is not even subject to the limitation which applies to trading companies (*Simpson* v. *Grange Trust Ltd.*[7]).

I do not get much assistance from these general considerations, and I turn to consider the words used in section 33. In the first place, not all expenses are included but only expenses of management. And secondly, it appears to me that the words in brackets "(including commissions)" are of considerable importance in determining what is meant by "expenses of management." I cannot believe that this form of drafting "expenses of management (including commissions)" could have been adopted unless it had been thought that commissions were at least so closely analogous to expenses of management that, without the words in brackets, it would have been doubtful whether commissions were or were not within the ambit of the leading words. That appears to me to be sufficient to negative one argument for the Crown—that expenses of management only include expenses involved in taking managerial decisions and exclude expenses involved in carrying them out in individual cases. Commissions arise from individual cases and if expenses of management had this narrow meaning they would differ so radically in their nature from commissions that I cannot see any reasonable person merely bringing them in in a parenthesis. Moreover, even without this consideration I should find it very difficult to accept the view that no part of the administrative expenses involved in dealing with individual policies, from receipt of a proposal to final payment of policy moneys, was to be regarded as expenses of management.

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[7] [1935] A.C. 422; 51 T.L.R. 320.

It is convenient at this point to note that it has not been argued for the appellants at any stage of this case that the payments of brokerage to stockbrokers are commissions within the meaning of that word as used in this section. I therefore express no opinion on that matter and I must deal with the case on the footing that if the appellants are to succeed they must bring these payments within the scope of the words expenses of management.

I do not think that it is possible to define precisely what is meant by "expenses of management." It has not been argued that these words have any technical or special meaning in this context. They are ordinary words of the English language, and, like most such words, their application in a particular case can only be determined on a broad view of all relevant matters. I cannot accept the argument for the appellants that every sum spent by the company is an expense of management unless it can be brought within certain limited classes of expenditure which are admittedly not expenses of management, such as payments to policy holders and the purchase price of investments acquired by the company. It is not enough to show negatively that a particular sum does not fall into any other class: it must be shown positively that it ought to be regarded as an expense of management. But looking to the purpose and content of the section it appears to me that the phrase has a fairly wide meaning so that, for example, expenses of investigation and consideration whether to pay out money either in settlement of a claim or in acquisition of an investment must be held to be expenses of management. And the collocation of the words "(including "commissions)" shows that a sum can be an expense of management whether the work in question is done by the company's staff or done by someone else on a commission basis, and it must follow that if work of an appropriate kind is done for a fixed fee that fee may also be an expense of management.

Admittedly the price paid for an investment is not an expense of management, and counsel for the appellants did not and could not reasonably withhold the admission that a sum spent on enhancing the value of a trading asset is not an expense of management. I do not think that it is practicable or reasonable to draw a rigid line between payments which enhance the value of an asset and payments which do not. For example, if a call is made in respect of shares not fully paid, paying the sum necessary would not be an expense of management, although there have been cases where shares remained of no value after becoming fully paid. It seems to me more reasonable to ask, with regard to a payment, whether it should be regarded as part of the cost of acquisition, on the one hand, or, on the other hand, something severable from the cost of acquisition which can properly be regarded as an expense of management.

If that be the true test, then I have no doubt that the sums paid for stamp duty were not expenses of management. The companies could not acquire and hold shares without making these payments and no matter of management was involved any more than it was in paying the price due to the seller. Buying the shares and paying the duty were inseparable. I do not say that no payment of duty can be an expense of management: for example, cheques are required for management and it seems to me that the cost of acquisition of cheque books must be an expense of management whether it arises from stamp duty or not. But where payment of duty is a necessary consequence of something which is not itself an expense of management, I do not see how the payment of duty becomes an expense of management.

The question as to payments of brokerage or commission to stockbrokers seems to me much more difficult. If it were possible for members of the companies' staffs to arrange purchases or sales direct with other sellers or buyers I cannot see how expenses involved in arranging sales or purchases could be other than expenses of management. And equally if the companies agreed to pay commission to persons who introduced sellers or buyers I think that commission earned in this way would also be expenses of management. But under modern conditions it may generally be impracticable to proceed in this way and buying and selling through stockbrokers subject to the rules of a stock exchange may be the only course to take. Nowadays an investor might well regard all payments to his stockbroker as simply parts of the cost of acquiring his shares and also regard the net sum received as the whole of what he has realized on a sale. But I do not think that these practical differences are sufficient to warrant payments to a commission agent and payments to a stockbroker being put in different categories and on this matter I think the appellants are right. I would allow the appeals but only to the extent of allowing relief in respect of sums disbursed as brokerage.

Lord Keith of Avonholm. My Lords, I agree with the opinion delivered by my noble and learned friend on the Woolsack and have nothing to add.

Lord Somervell of Harrow. My Lords, the option of the Crown to tax the profits of a trade under Case I or to tax the income from investments under Cases III, IV or V has long been recognized. In respect of income which has suffered tax by deduction the exercise of the option leaves things as they are.

Notwithstanding the explanation that has been given (see *Revell* v. *Edinburgh Life Insurance Co.*[8]) it has always seemed to me anomalous to assess traders on a sum arrived at irrespective of all expenses of earning the profits, if any. It might be said to be in conflict with the "one point" which Lord Watson said was free from obscurity, namely, that the legislature intended all traders whether in groceries, annuities or other articles of commerce to be assessed upon the same footing (*Gresham Life Assurance Society* v. *Styles*[9]).

Parliament decided to deal with this anomaly in 1915. Assurance companies carrying on life assurance business, companies whose business consists mainly in the purchase of investments and savings banks, became entitled, on proof that they had been charged to tax by deduction or otherwise, and not charged on their profits under Case I, to repayment of so much of the tax paid as equalled any sums disbursed as expenses of management (including commissions).

Proviso (*a*) reads as follows: "relief shall not be given under "this section so as to make the income tax paid by the company

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[8] (1906) 5 T.C. 221, 226.

[9] [1892] A.C. 309, 318; 8 T.L.R. 618.

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"less than the tax which would have been paid if the profits of "the company had been charged in accordance with the said "rules."

The Life Assurance Companies Act, 1870, provides, by section 4, that a company carrying on life assurance and other business must keep a separate account in respect of its life assurance fund and prepare a revenue account in the form set out in Schedule I. On the right hand side of the form appear the items, "commission," "expenses of management," "other payments (accounts to be specified)." This Act was repealed and the above provisions re-enacted in the Assurance Companies Act, 1909.

Parliament having decided to deal with the anomaly, one would expect it to be removed wholly or substantially. There would seem to be no sense in leaving life insurance companies still liable to suffer tax on some sum over and above their profits. The formula "expenses of management (including commissions)" is clearly taken from the form of revenue account in the Schedule to the Life Assurance Companies Act. I would regard the words themselves as apt to cover the expenses which would normally be deductible in respect of its life assurance business if an assurance company carrying on life assurance business was assessed as a trade. There may be, as the Assurance Acts recognize, "other "payments" which might or might not be deductible under Case I. The fact that these words are qualified by the words "accounts to be specified" is, I think, some indication that the words "expenses of management" and "commission" were regarded as covering all ordinary expenses. Proviso (*a*) contemplates that expenses of management (including commissions) may exceed in amount the expenses which would be deductible under Case I. This weighs heavily against the very restricted sense of management for which the Revenue contended. The section has to operate by providing for a repayment of tax already suffered. The purchase price of the investment cannot enter into the computation as an expense. It would only come in if one was in search of the "profit" made subsequently by its realization.

Having regard to the intention of the section to be gathered from its terms and to the statutory background, the words should be given, in my opinion, a wide construction. I wholly reject the distinction sought to be drawn between the management and the carrying on of the business, restricting the former to the head management.

The section also refers to companies whose business consists mainly in making investments, and some reference was made to this in argument. Investment companies are, I think, commoner today than they were in 1915. In *Scottish Investment Trust Co. Ltd.* v. *Inland Revenue* [10] an investment company was held liable to pay tax on the net gains realized by selling investments at a profit. It was stated and I accept that there are today investment companies whose purchases and sales of securities do not constitute a " trade." In *Simpson* v. *Grange Trust Ltd.*[11] it was admitted by the inspector of taxes that the company—an investment company—was not carrying on a trade. The memorandum and articles were exhibited but do not appear in the report. The question would turn, as it did in the *Scottish Investment Trust* case,[12] on the wording of the articles and perhaps on the policy of the company. Life assurance companies were, in any case, the main subject-matter of section 14 of the 1915 Act, and I doubt whether Parliament had in mind that certain companies whose business consisted in the " making "—not, be it marked, the " holding "—of investments might be held to be outside Case I in respect of the profits of their dealings. I do not myself think that the possibility of such cases throws any light on the construction of the clause.

Unaided, I would, I think, have come to the conclusion that the items in issue here were expenses of management. The buying and selling of securities is clearly part of the business of the company, and a function of management. No one would dispute that it was proper to buy and sell on the Stock Exchange. Might not the expenses of doing so be said to be expenses of management? This is plainly a possible view as it was that taken by the Inland Revenue from 1915 to about 1940. It was also, I think, the view taken by some of the learned judges below, although they held themselves bound by *Golder's* case.[13] I am, however, impressed by the arguments on the other side as restricted to these two particular items. The brokerage and stamp duty, though not, as the commissioners held in *Golder's* case,[13] an integral part of the purchase price, are a direct and necessary part of the cost of a normal method of purchase. I therefore, with some hesitation, agree that they should not be treated as expenses of management, and that the appeals should be dismissed.

Appeals dismissed.

Solicitors: *Slaughter & May; Hair & Co.; Solicitor of Inland Revenue.*

F. C.

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[10] (1893) 21 R. 262; 3 T.C. 231.

[11] [1935] A.C. 422; 51 T.L.R. 320.

[12] 21 R. 262; 3 T.C. 231.

[13] 65 T.L.R. 772.

[HOUSE OF LORDS.]

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Mar. 25, 26, 28, 29;
July 4.

WESTMINSTER BANK LTD. . . . . APPELLANT;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

WRIGHTSON AND ANOTHER . . . . APPELLANTS;

AND

SAME . . . . RESPONDENTS.

Revenue—Estate duty—Property chargeable—Property deemed to pass—Settlement—Life assurance policy on settlor's life—Death of settlor—Whether estate duty payable—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2 (1) (*d*).

Settlement—Interest in expectancy—Policy of assurance.

Judicial Precedent—Decision long undisturbed—Subsequent legislation—Finance Act.

By a settlement made in 1929, a settlor assigned to a trustee on trusts declared in the settlement two policies of assurance on his life. Both were fully paid up at the date of the settlement. The settlor also paid to the trustee £12,000 in cash.

By clause 2 of the settlement the trustee, out of the proceeds of the policies, was to pay all death duties leviable on the settlor's death in respect thereof and invest the residue and was to invest the £12,000 forthwith in specified investments. By clause 3 the trustee was to accumulate the income of the trust fund until June 30, 1942. By clause 4 the trustee was to "pay the income of the "trust fund and the accumulations thereof and of the investments "for the time being representing the same (the said policies and "the proceeds thereof however not to be treated as income bearing "until the amounts payable in respect thereof shall have been "received and invested)," in the events which happened, to the settlor's nephew J. B. for life. The income of the trust fund was accordingly paid to J. B. from June 30, 1942.

The settlor died in 1951, and bonds and cash amounting to £19,755 2s. having been received by the trustee in satisfaction of the policies, estate duty was claimed under section 2 (1) (*d*) of the Finance Act, 1894, on the life interest of J. B. in that sum:—

Held (Lord Radcliffe dissenting), that estate duty was not payable because, although the policies of assurance and their proceeds were provided by the settlor so as to come within the words "any annuity or other interest . . . provided by the deceased" settlor in section 2 (1) (*d*) of the Finance Act, 1894, the interest of J. B. in the policy moneys when paid did not represent "a

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* *Present*: EARL JOWITT, LORD MORTON OF HENRYTON, LORD REID, LORD RADCLIFFE and LORD KEITH OF AVONHOLM.

"beneficial interest accruing or arising . . . on the death of the "deceased," since J. B.'s right on the death was not different in kind from that previously enjoyed by him.

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Per Lord Radcliffe. When a man takes out a policy on his life and ties it up in this way, it is of the essence of the arrangement that he makes and the benefits that he provides that those benefits arise on and by virtue of his death and not before.

D'Avigdor-Goldsmid v. *Inland Revenue Commissioners* [1953] A.C. 347; [1953] 1 All E.R. 403 applied.

Decision of the Court of Appeal (sub nom. *In re Barbour's Policies of Assurance*) [1956] Ch. 452; [1956] 1 All E.R. 627 reversed.

By a settlement made in 1932 a settlor assigned to trustees four fully paid life assurance policies on his life, directing them, on receipt of the policy moneys, to divide them into six equal parts. Three of these were to be paid to the trustees of another settlement, the N. Hall settlement, to be held as capital moneys thereunder on the trusts affecting the N. Hall estate. (At the time of the settlor's death his eldest son J. G. W. was tenant for life under this settlement.) Each of the other three equal parts was to be invested and the income thereof was to be applied for the benefit of the settlor's three younger sons, P. W., R. W. and O. W. respectively. The settlor having died in 1950, the policy moneys were got in as directed, the amount received being £22,380 16s. 9d.:—

Held (Lord Reid and Lord Radcliffe dissenting), that estate duty was not payable under section 2 (1) (*d*) of the Finance Act, 1894, on the value of the interests of the four sons in the policy moneys.

Per Lord Reid. It could not be inferred that before the death of the settlor the sons had any right with regard to the policies other than the right to prevent the trustees from acting improperly and to ensure the preservation of the trust fund.

Decision of the Court of Appeal (sub nom. *In re Wrightson's Policies*) (1956) 35 A.T.C. 16 reversed.

APPEALS from the Court of Appeal (Lord Evershed M.R., Birkett and Romer L.JJ.).

The first appeal by the appellant, Westminster Bank Ltd. (hereafter called " the bank ") was from an order of the Court of Appeal dated February 21, 1956, which by a majority (Romer L.J. dissenting) allowed an appeal by the respondents, the Commissioners of Inland Revenue, from an order of the Chancery Division of the High Court of Justice (Harman J.) made on July 14, 1955, on an application of the bank by originating summons pursuant to the Administration of Justice (Miscellaneous Provisions) Act, 1933, to have a question of liability for estate duty determined. The second appeal was from an order of the Court of Appeal dated February 21, 1956, unanimously allowing an appeal by the respondents from an order of the

Chancery Division (Harman J.) made on July 22, 1955, on an application by the appellants, Sir John Garmondsway Wrightson, Bt., and Oliver Wrightson, by originating summons pursuant to the Act of 1933 to have a similar question determined.

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The originating summons in the matter of two several policies of assurance on the life of Sir John Milne Barbour, deceased, effected with the Scottish Amicable Life Assurance Society and comprised in a settlement dated March 5, 1929, raised the question " whether having regard to the provisions of the above-" mentioned settlement and in the events that have happened " estate duty became payable under section 2 (1) (*d*) of the " Finance Act, 1894, or otherwise on the death of the late Sir " John Milne Barbour in respect of the life interest of James " Barbour in the money or property assured by the above-" mentioned policies of assurance." Harman J. held that estate duty did not become payable. The Court of Appeal reversed his decision. It was not contended that duty was payable otherwise than under section 2 (1) (*d*).

The facts, stated by Lord Morton of Henryton, were as follows: The settlement of March 5, 1929, was made between the settlor of the one part and the appellant, Westminster Bank Ltd., of the other part, and contained recitals stating (inter alia) that the settlor was absolutely entitled to the four policies of assurance specified in the schedule thereto and that the settlor had paid to the bank the sum of £12,000 to be held by the bank upon the trusts thereinafter declared. The settlor was at all material times domiciled in Northern Ireland, and the House of Lords were concerned only with two of the policies, which were, at the settlor's death in October, 1951, locally situate in England. Those two policies were made with the Scottish Amicable Life Assurance Society. In one case the insurers promised, in consideration of a single premium already paid at the date of the settlement, to pay to the executors, administrators and assignees of the settlor the sum of £7,000, with profits, on the settlor's death. In the other case, in consideration of annual premiums payable during a period which had expired at the date of the settlement, the insurers covenanted on the settlor's death to pay or transfer to his executors, administrators and assignees two specified 4 per cent. Victory Bonds of £5,000 each; and the policy further provided that in the event of either of the bonds being drawn for redemption during the currency of the policy the settlor or his assigns should (in effect) be paid 15 per cent. of the amount of the bond and that the balance of 85 per cent. thereof should be paid on the settlor's death to his executors, administrators and assigns.

By clause 1 of the settlement the settlor assigned to the bank the four policies "and all moneys to become payable thereunder "and the full benefit thereof to hold the same unto the bank "upon the trusts and subject to the powers and provisions "hereinafter declared and contained concerning the same."

Clause 2 was as follows: "The bank shall out of the proceeds "of the said respective policies pay all death duties if any "leviable at the death of the settlor in respect thereof and all "costs and expenses incurred by the bank in connexion with the "collection and receipt of the proceeds of the said policies and "shall invest the residue of the said moneys and shall forthwith "invest the said sum of twelve thousand pounds (which moneys "and the property for the time being representing the same and "the accumulations of the income thereof hereinafter directed to "be made are hereinafter called 'the trust fund') in the name "of the bank in or upon . . ." Then followed a list of investments which need not be set out.

Clauses 3 and 4 were as follows:

"3. The bank shall until June 30, 1942, accumulate the entire "income of the trust fund by investing the same and the resulting "income thereof at compound interest in any of the investments "hereby authorized and shall hold and apply the accumulated "fund as part of the capital of the trust fund."

"4. From and after the said June 30, 1942, the bank shall "pay the income of the trust fund and of the accumulations "thereof and of the investments for the time being representing "the same (the said policies and the proceeds thereof however "not to be treated as income bearing until the amounts payable "in respect thereof shall have been received and invested) to the "settlor's son John Milne Barbour during his life and if necessary "the said income shall be apportioned as between capital and "income as of the said respective dates."

Clause 5 contained trusts to take effect after the death of John Milne Barbour in favour of his sons and grandsons. In fact, John Milne Barbour predeceased the settlor. He died without issue in the year 1937, that was, during the period of accumulation. Accordingly, by the effect of certain subsequent clauses of the settlement, the name of the settlor's nephew James Barbour

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was to be substituted for that of his son for all the purposes of the beneficial interests conferred by the settlement; in other words, the settlor's nephew James became the first tenant for life under the settlement, and he was entitled by virtue of its terms to the income of " the trust fund " as defined in clause 2.

Two further facts were material. First, the settlement contained no power for the bank to sell or surrender any of the policies. Secondly, in the year 1935 one of the Victory Bonds was drawn for redemption, so that the bank then received in respect of it the sum of £750. The bank then became bound to invest that sum, and after the expiry of the period of accumulation in 1942 the bank became bound to pay the income of that sum and all its accumulations immediately to James Barbour.

Geoffrey Cross Q.C. and *J. A. Wolfe* for the appellant bank. There cannot be a donee before there is a gift: *Lord Advocate* v. *Robertson.*[1] The present case is not distinguishable from *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners.*[2] which applies to it, and accordingly the estate duty claimed is not payable. Both before and after the death James Barbour had a life interest in possession in the policies; on the death of the settlor there was no change in the quality of the right by reason of the policies maturing. When rights are created in a policy of assurance, they arise in the contract constituted by that policy and no change in the quality of those rights occurs on the maturity of the policy. That is the whole point of this case. The *D'Avigdor-Goldsmid* case [2] covers the case of a settled policy.

In 1935, when one of the Victory Bonds was drawn for redemption, the beneficial interest in the sum of £750 accrued to somebody, namely, the life tenant. So far as the life tenant had an interest in this bundle of rights, it was the same throughout, an interest in possession. When a person is absolute owner of a policy no fresh beneficial interest arises on the death of the assured: *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners.*[3] Here the beneficial interest of the life tenant in the policies was the same both before and after the death. One cannot separate the policy from the policy moneys. The only thing that happened on the death was that the date of payment had arrived. The respondents could only succeed if they showed that a beneficial interest arose on the death. If, however, the life tenant did not really have an interest in the policy at all, his only interest was in the proceeds as and when they came in, with the right to see that the trustees carried out their trust. That would be a beneficial right in relation to the trust fund and it would not change in character on the settlor's death. That situation produces a dilemma for the Crown.

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[1] [1897] A.C. 145, 152; 13 T.L.R. 216.

[2] [1953] A.C. 347; [1953] 1 All E.R. 403.

[3] [1953] A.C. 347.

Reliance is placed on *Lord Advocate* v. *Hamilton's Trustees*,[4] which was unanimously approved in the *D'Avigdor-Goldsmid* case [5] so far as related to the absolute interests of the sons. There is nothing in *Tennant* v. *Lord Advocate* [6] to support the view that the coming into possession of the policy moneys is the accruing of a beneficial interest in the policy. That authority does not help in this case in the least. All it decides is that if a man owns a policy it cannot be said that he never had an interest in the policy moneys.

Further, the policies of assurance and their proceeds were not provided by the settlor within the words "any annuity or other "interest . . . provided by the deceased" in section 2 (1) (*d*) of the Finance Act, 1894. On the words of the Act, without authority, it would appear that they are not an "annuity or other "interest" within that sub-clause. The words are not apt to cover them. Even if the words are apt to do so, they must be cut down by reference to section 2 (1) (*c*), which incorporated the provisions of section 38 of the Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act, 1889. These are complete and exclusive, covering policies on the life of the deceased, so that section 2 (1) (*d*) does not apply to them: see *Lord Advocate* v. *Robertson*.[7] The words "other interest" are ejusdem generis with annuities: *Adamson* v. *Attorney-General*.[8] *Attorney-General* v. *Murray* [9] should not be followed. In *Attorney-General* v. *Robinson* [10] the case fell within section 2 (1) (*c*) and therefore it was unnecessary to consider whether it fell within section 2 (1) (*d*). In the *D'Avigdor-Goldsmid* case [11] a doubt was expressed whether a policy was an "other interest" within section 2 (1) (*d*). See also *Lord Advocate* v. *Hamilton's Trustees*.[12]

J. A. Wolfe following. In the *D'Avigdor-Goldsmid* case [13] the three conditions needed to satisfy section 2 (1) (*d*) are set

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[4] 1942 S.C. 426.

[5] [1953] A.C. 347.

[6] [1939] A.C. 207; 55 T.L.R. 472; [1939] 1 All E.R. 672.

[7] [1897] A.C. 145.

[8] [1933] A.C. 257; 49 T.L.R. 169.

[9] [1904] 1 K.B. 165; 20 T.L.R. 137.

[10] [1901] 2 I.R. 67, 87.

[11] [1953] A.C. 347, 367.

[12] 1942 S.C. 426, 440.

[13] [1953] A.C. 347, 366.

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out. They are not satisfied in the present case. The property settled was always the same, alike the policies and the £12,000. No change took place as regarded the settled fund as a whole as a result of the settlor's death. In the case of *Adamson* v. *Attorney-General* [14] there was a change as regarded the trusts of the fund. The trusts here set out in the settlement are independent of the death of the settlor, and, since there was no alteration in the nature of the trust funds, section 2 (1) (*d*) cannot apply to any of the beneficial interests. The life tenant's right to the enjoyment of the income (whatever it might be represented by) was a right which he had in possession already at the time of the death.

As to the question whether the policies come within the words "any annuity or other interest . . . provided by the deceased" in section 2 (1) (*d*), throughout the Finance Act, 1894, when the legislature means "property" it says "property," and here "interest" cannot be read as synonymous with "property"; it must have a less extended meaning than "property."

John Pennycuick Q.C. and *E. B. Stamp* for the respondents. This case satisfies the three conditions set out in *D'Avigdor-Goldsmid's* case [15] which are necessary to bring it within section 2 (1) (*d*). But that decision has no application to the present case, because here, before the settlor's death, the life tenant had no interest in the policies or policy moneys. That case was a case of an absolute gift of a policy, a gift taking effect once and for all on its being made. In *Attorney-General* v. *Lloyds Bank Ltd.*[16] liability under section 2 (1) (*d*) was admitted so far as the children's interests at the date of the relevant death exceeded the value of those interests immediately before the death. The ordinary case under section 2 (1) (*d*) is one where there is no interest in possession during the life of the settlor but an interest is taken on his death, so that during the settlor's life the beneficiary really has an interest in expectancy, e.g., a right to the future enjoyment of the fund. As to the general principle of liability, see also section 28 of the Finance Act, 1934. See also *Adamson* v. *Attorney-General* [17] and *Attorney-General* v. *Lloyds Bank Ltd.*[18] In the former case an interest in a fund consisting of investments which accrued or arose on the death of the deceased was held to be a "beneficial interest accruing or arising" on the

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[14] [1933] A.C. 257.

[15] [1953] A.C. 347, 363, 366, 374–375.

[16] [1935] A.C. 382.

[17] [1933] A.C. 257, 267–268, 273, 277, 278, 287–288.

[18] [1935] A.C. 382, 393–394.

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death within section 2 (1) (*d*). There is no reason in principle to treat differently an interest in a policy of assurance or in the moneys payable thereunder which accrues or arises on the death of the deceased from such an interest in any other item of property. It is possible to settle a policy in such a way that the interest will accrue on the death of the settlor and the beneficiary will then take an interest in possession which he did not possess before, although if it is found, on an analysis of the trust, that A had indeed a life interest in the policy from the inception of the settlement, there will be no liability under section 2 (1) (*d*) on the death of the settlor. The whole question is: At what moment of time has A taken an interest in possession? A beneficiary might have a life interest in possession in part of the trust fund and an interest in expectancy in another part. The policy does not become an income-producing asset until the death. What the settlor provides is a chose in action called a policy, the company undertaking to pay a given sum in a given event. When that event happens the chose in action is transmuted from an obligation into a sum of money in the hands of the trustees. It is the same property transmuted. There is nothing in the *D'Avigdor-Goldsmid* case [19] to suggest that the policy moneys do not represent that which was provided by the settlor. It was held there that no beneficial interest accrued on the death because the beneficiary always had a full beneficial interest. Where a policy of insurance on a settlor's life is held by trustees until his death, so that a life tenant cannot enter into enjoyment of the life interest in the proceeds of the policy until the death, a beneficial interest in the life policy arises or accrues to the life tenant on the death. If the life tenant cannot require the trustees to convert the policy into an income-bearing asset during the settlor's lifetime, the life tenant has only an interest in expectancy which becomes an interest in possession if he survives the settlor. No one has a beneficial interest in these policies so long as no moneys are payable under them. The life tenant from the first had a life interest in expectancy in their future proceeds whenever they became payable. Whenever any money was paid under the policies, or the company came under a liability to pay any money under them, the life tenant acquired a life interest in possession in the money so paid. That interest in possession is different in quality from the previous life interest in expectancy and section 2 (1) (*d*) is accordingly brought into play. Further.

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[19] [1953] A.C. 347.

it must be treated as a life interest provided by the settlor. Admittedly if A gives B £2,000 and B buys a car with it, A has not provided the car. But a settlor provides anything which is derived from his bounty; every beneficial interest under the settlement is provided by him and the property in which that interest subsists is provided by him. This applies to investments as well as to policies. *Sneddon* v. *Lord Advocate*[20] was a different case, a gift inter vivos, a single operation.

On the true construction of this settlement, neither the life tenant nor any of the beneficiaries was intended to have any enjoyment of the policy moneys until the settlor's death, except for any sum payable during his life on the redemption of a Victory Bond. This case, like any other case, turns on the terms of the settlement to be construed in the light of the general law. Section 2 (1) (*d*) applies to it because it is an ordinary type of settlement. With an unusual type of settlement it might be otherwise.

An interest in possession means a right to present enjoyment. An interest in expectation means a right to future enjoyment, whether or not it is contingent. When the property settled is income-bearing, the intention of the settlor is generally easy to gather, but, if it is not income-bearing, one must look at the document to see during what period it was intended that the beneficiary should enjoy it.

Lord Advocate v. *Hamilton's Trustees*[21] is not an authority binding on this part of the case. See also *In re Scholfield's Will's Trusts*,[22] *Hill* v. *Trenery*[23] and *Beresford* v. *Beresford*.[24]

On the question whether the property here settled comes within the description " any annuity or other interest " in section 2 (1) (*d*), the decision in *Adamson* v. *Attorney-General*[25] proceeds on the footing that " property " includes assets of any description, and there is no reason why it should not. The same assumption runs through the *D'Avigdor-Goldsmid* case,[26] save for the doubt of Lord Morton of Henryton. The policies are not excluded from section 2 (1) (*d*) by any necessary inference from section 2 (1) (*c*). Reliance was placed by the appellants on certain provisions of the Customs and Inland Revenue Acts, 1881 and 1889, but they are concerned exclusively with cases of a gift and the subsequent keeping up of the policies. It is inconceivable that Parliament should have intended to exclude many common cases from the scope of section 2 (1) (*d*). If it had so intended, it would have used express language. These policies cannot be excluded by inference from the terms of an earlier Act. *Attorney-General* v. *Murray*,[27] deciding this point, has stood for over 50 years and should not be reversed now.

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[20] [1954] A.C. 257; [1954] 1 All E.R. 255.

[21] 1942 S.C. 426.

[22] [1949] Ch. 341, 344; 65 T.L.R. 156; [1949] 1 All E.R. 490.

[23] (1856) 23 Beav. 16.

[24] (1857) 23 Beav. 292.

[25] [1933] A.C. 257.

[26] [1953] A.C. 347.

Geoffrey Cross Q.C. in reply. The policies themselves are comprised in the trust fund. The life interest, including the policies, was a vested life interest in the whole trust fund and not subject to any contingency or condition of defeasance whatever. The fact that it was an expectant interest does not mean that it was a contingent interest: see *In re Legh's Settlement Trusts*.[28] After 1942 the life tenant had a vested life interest in the whole trust fund. One must not confuse the case of a life interest in a subject-matter not producing any income and a life interest subject to a prior life interest. *Adamson* v. *Attorney-General* [29] turned on the fact that the interest there was defeasible. That case must not be carried too far, particularly in view of the powerful dissenting opinion. *Attorney-General* v. *Lloyds Bank Ltd.*[30] adds nothing to that case.

What the life tenant got here on the settlor's death was not sufficiently different from what he had before to bring in section 2 (1) (*d*). A new interest did not arise on the death in a beneficial interest provided by the settlor. When there is a change from an interest in expectancy to an interest in possession, there is not a relevant change, unless there is an intervening interest. This life tenant always had an interest in possession.

Their Lordships took time for consideration.

WRIGHTSON *v.* INLAND REVENUE COMMISSIONERS.

The facts, stated by Lord Morton of Henryton, were as follows: The originating summons issued in this case raised the question whether, having regard to the provisions of a settlement of June 21, 1932, and in the events that happened, estate duty became payable under section 2 (1) (*d*) of the Finance Act, 1894, or otherwise on the death of Sir Thomas Garmondsway Wrightson, Bt. (hereafter called "the settlor") in respect of the life interests of his four sons in the proceeds of four several policies of assurance on the life of the settlor comprised in the said settlement. Harman J. held that estate duty did not become payable, but his decision was reversed by the Court of Appeal (The Master of the Rolls and Birkett L.J., Romer L.J. dissenting). In this case, as in *Westminster Bank Ltd.* v. *Inland Revenue Commissioners*, it was not contended that duty could be payable otherwise than under section 2 (1) (*d*) of the Finance Act, 1894.

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[27] [1904] 1 Q.B. 165.

[28] [1938] Ch. 39; 53 T.L.R. 1036; [1937] 3 All E.R. 823.

[29] [1933] A.C. 257.

[30] [1935] A.C. 382.

The settlement of June 21, 1932, was made between the settlor of the one part and two trustees of the other part. By clause 1 the settlor assigned to the trustees four fully paid policies of assurance on his own life " and all bonuses and additions assured by or to " become payable under the said policies or any of them and the " full benefit thereof " upon the trusts and with and subject to the powers and provisions thereinafter declared of and concerning the same. Clauses 2, 3 and 4 were as follows:

" 2. The trustees shall receive all moneys assured by or to " become payable under the said policies on maturity (hereinafter " called ' the trust fund ') and shall divide the same into six equal " parts.

" 3. The trustees shall pay three equal sixth parts of the trust " fund to the persons who shall then be the trustees for the purpose " of the Settled Land Act, 1925, of a settlement (hereinafter " called ' the Neasham Hall settlement ') created by the will " dated November 21, 1899, and two codicils thereto dated respec- " tively January 11, 1911, and March 15, 1920, of Sir Thomas " Wrightson Baronet who died on June 18, 1921, to be held by " them upon trusts and limitations and with powers corresponding " to the trusts limitations and powers affecting the Neasham Hall " Estate thereby settled in strict settlement or such of the same " trusts limitations and powers as shall then be subsisting and " capable of taking effect.

" 4. The trustees shall invest one equal sixth part of the " trust fund hereinafter called ' Peter's share ') in any manner " hereby authorized and shall apply the income thereof for the " maintenance education and benefit of the said Peter Wrightson " until he shall attain the age of twenty-one years and shall there- " after pay the income thereof to the said Peter Wrightson during " his life or until he shall become tenant for life of the said " Neasham Hall Estate."

Clauses 5 and 6 contained trusts in favour of the settlor's sons Rodney and Oliver respectively in the same terms as clause 4, save for the alteration in the name of the beneficiary.

Clause 7 was as follows: "If and when any of them the said "Peter Wrightson Rodney Wrightson and Oliver Wrightson shall "become tenant for life of the said Neasham Hall Estate or shall "die then the trustees shall pay or transfer his share of the trust "fund and the investments for the time being representing such "share to the then trustees of the Neasham Hall settlement to "be held by them upon trusts and limitations and with powers "corresponding to the trusts limitations and powers affecting the "said Neasham Hall Estate so settled as aforesaid or such of the "same trusts limitations and powers as shall then be subsisting "and capable of taking effect And if there shall be no such "trustees the trustees shall hold such share and the income "thereof upon the like trusts as if the same had been or represented capital moneys arising under the Settled Land Act, "1925, from the Neasham Hall Estate so settled as aforesaid."

The 1932 settlement contained no power for the trustees thereof to sell or surrender any of the policies.

The settlor died on January 7, 1950. At that date his four sons were all alive and over the age of 21. The eldest son became tenant for life of the Neasham Hall estate during his father's lifetime.

The appellants were the trustees of the settlement.

Geoffrey Cross Q.C. and *J. A. Wolfe* for the appellants. There is in each of the tenants for life a beneficial interest in possession in the policies. If, say, in a liquidation of the insurance company, the moneys fell in before the settlor died, the trustees would take out a summons to ask the court what to do with them. There is no material distinction between this and the last case. Those who have vested life interests in the proceeds of the policies were in possession of the policies before the death. There was no prior life interest or contingency or defeasance. The appellants have offered to abide by the result of the last case and the Crown should pay costs even if the appeal is dismissed.

J. A. Wolfe following. Someone must always be in beneficial possession of property. One might have the case of settled debentures not producing interest because of a moratorium. Similarly, an insurance policy cannot produce income until the death of the assured, but the tenant for life of the settlement by which it is settled is tenant for life in possession. A settlement might contain a provision directing the investment of the trust fund in insurance policies; the tenant for life would not go out of possession of the property so invested. It is inconceivable that there should not be a person beneficially in possession of property; that would be foreign to the conceptions of our law.

John Pennycuick Q.C. and *E. B. Stamp* for the respondents. This case is more favourable to the Crown than the last and is distinguishable from it. Persons who have an interest in a trust fund have always together the entire beneficial interest in the trust fund and have complete dominion over it. That is the case with every settlement. But one must take the trusts as they stand at the date of the death. If a beneficial interest in the trust property does accrue to a person on the settlor's death, the case comes under section 2 (1) (*d*). It is irrelevant whether or not all the beneficiaries are sui juris. Both in this case and in the previous one the beneficiaries concerned had only an interest in expectancy during the settlor's life, and on his death they acquired for the first time a right of present enjoyment. In the present case the terms of the settlement make it clear beyond question that none of the brothers was intended to take any beneficial interest in the policies or proceeds in the lifetime of the settlor. That was so also in the previous case, but here it is particularly plain. There is also a distinction between a contingent and vested reversionary life interest: see *In re Legh's Settlement Trusts*.[31] If it be held that these beneficiaries had some kind of interest in possession in the settlor's lifetime, nevertheless on his death there arises an indefeasible right which brings the case within *Adamson* v. *Attorney-General*.[32] The present case is different from the previous case, because each son had only a contingent interest during the settlor's lifetime. On the settlor's death each son took a vested interest for the first time. The relevant interests were clearly contingent in the present case.

E. B. Stamp following. The tenants for life before the settlor's death had no right of enjoyment or possession. The property was being retained for the reversioner.

Geoffrey Cross Q.C. replied.

Their Lordships took time for consideration.

July 4. EARL JOWITT. My Lords, I have had the advantage of reading in print the speech about to be delivered by my noble and learned friend, Lord Morton of Henryton, with which I agree.

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[31] [1938] Ch. 39, 48, 52.

[32] [1933] A.C. 257.

LORD MORTON OF HENRYTON. My Lords, I turn first to the case of *Westminster Bank Ltd.* v. *Inland Revenue Commissioners*. The originating summons in this case raised the question whether, having regard to the provisions of a settlement of March 5, 1929, and in the events that have happened, estate duty became payable, under section 2 (1) (*d*) of the Finance Act, 1894, or otherwise, on the death of Sir John Milne Barbour (hereafter called " the settlor ") in respect of the life interest of James Barbour in the money or property assured by two several policies of assurance on the life of the settlor effected with the Scottish Amicable Life Assurance Society and comprised in the said settlement. Harman J. held that estate duty did not become payable, but his decision was reversed by the Court of Appeal (the Master of the Rolls and Birkett L.J., Romer L.J. dissenting). It was not contended that duty could be payable otherwise than under section 2 (1) (*d*) of the Finance Act, 1894.

I shall at once set out the relevant portions of sections 1 and 2 of that Act.

" 1. In the case of every person dying after the commencement of this Part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'estate duty,' at the graduated rates hereinafter mentioned . . .

" 2. (1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say . . . (*d*) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

It is apparent that in order to answer the question raised by the originating summons your Lordships have to determine—(1) whether by the settlement of March 5, 1929, the settlor provided " any annuity or other interest " within the meaning of section 2 (1) (*d*); and (2), if so, whether, on the death of the settlor, a beneficial interest in the property so provided accrued or arose to James Barbour within the meaning of the same section.

[His Lordship stated the facts and continued:] I now turn to the first of the two questions stated above.

My Lords, in the case of *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners*[1] I expressed a doubt whether a policy of assurance was an "annuity or other interest" within the meaning of section 2 (1) (*d*) of the Act of 1894, and if I had to decide that question in the absence of authority, I should feel the same doubt today. The argument presented by counsel for the appellant has considerable attractions. However, in *Attorney-General* v. *Murray*[2] the Court of Appeal answered that question briefly in the affirmative. That decision has stood unquestioned for over 50 years and very many policies must have been dealt with on the footing that it was correct. Moreover, this House in *Adamson* v. *Attorney-General*[3] gave a wide meaning to the words just quoted, though it does not appear that the trust funds included any policy of assurance. Finally, if the decision in *Murray's* case[4] had not been in accordance with the intentions of the legislature, it is reasonable to suppose that the necessary amendment would have been made in some subsequent Finance Act. In these circumstances, I think that this is plainly a case in which the principle "stare decisis" should be applied, and I would therefore hold that when the settlor provided the four policies, as he undoubtedly did, he provided an "annuity or other "interest" within the meaning of section 2 (1) (*d*). I would add that, in my opinion, the settlor also "provided" the moneys which became payable to the trustees on his death and the investments representing these moneys from time to time during the continuance of the trusts declared by the settlement. All these items of property were the direct result of his bounty. In the course of the argument the very pertinent question was asked: "If the settlor did not provide these moneys and investments, "who did provide them?" and I can see no satisfactory answer to that question. Reference was made to the case of *Sneddon* v. *Lord Advocate*,[5] but I can find nothing in that case which conflicts with the opinion which I have just expressed. In *Sneddon's* case[5] the House had to consider the provisions of section 2 (1) (*c*) of the Finance Act, 1894, incorporating the provisions of section 38 (2) (*a*) of the Customs and Inland Revenue Act, 1881, and the decision turned on the words "property taken under a disposition "made by the deceased purporting to operate as an immediate "gift inter vivos by way of declaration of trust." It was held

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[1] [1953] A.C. 347, 367; [1953] 1 All E.R. 403.

[2] [1904] 1 K.B. 165; 20 T.L.R. 137.

[3] [1933] A.C. 257; 49 T.L.R. 169.

[4] [1904] 1 K.B. 165.

[5] [1954] A.C. 257; [1954] 1 All E.R. 255.

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that the "property taken" within the meaning of that section was a sum of £5,000 given to trustees by a truster and not the investments in which the trustees decided to invest that sum. In the present case the wording of the section is, in my opinion, vitally different. I need not elaborate this matter further, as I understand that your Lordships are all agreed that *Sneddon's* case [5] is distinguishable from the present case.

I realize, however, that in the course of stating my opinion in the *D'Avigdor-Goldsmid* case [6] I made certain observations which may not accord with my present view that the settlor provided the policy moneys as well as the policies. For instance, I said [7]: "The only 'other interest' purchased or provided by "the deceased (Sir Osmond) was the policy." That observation was not necessary for the decision of the case. The point which all the members of the House, including myself, were concerned to establish was that it was not *only* the policy moneys which were provided by the deceased, for he also provided the policies the source from which these moneys came. No other member of the House associated himself with the particular observations to which I now refer, although Lord Porter approved of my analysis of certain authorities and Lord Asquith of Bishopstone expressed his concurrence with my opinion. In these circumstances I feel free to say that, in my opinion, any observations of mine which stated or implied that the deceased, Sir Osmond, did not "provide" the policy moneys were to that extent incorrect.

I would answer the first question, already stated, in the affirmative.

I now turn to the second question, whether on the death of the settlor a beneficial interest in the property provided by the settlor accrued or arose to James Barbour.

My Lords, in my view this question should be answered in the negative, having regard to the *D'Avigdor-Goldsmid* case.[8] The facts of that case were as follows: By a marriage settlement made in 1907 a settlor settled a policy on his life effected in 1904 for £30,000 with profits. Subsequently a resettlement of the policy was made, and on November 10, 1934, the settlor and his eldest son, under a joint power of appointment conferred by the resettlement, appointed the policy and other settled property to the son absolutely. The settlor died in 1940 and his son received under the policy £48,765. Estate duty was claimed on this sum under section 2 (1) (*d*) of the Act of 1894. It was held by your Lordships' House that duty was not payable, since from 1934 the policy belonged to the son and no beneficial interest in it accrued or arose on the death of the deceased within the meaning of the section. Viscount Simon expressed his views as follows[9]: "A life policy is a piece of property which confers upon the owner "of it the right, if certain conditions continue to be satisfied, to "claim and be paid the policy moneys on the death of the person "whose life is assured. These rights therefore belonged to the "appellant from 1934 and were the beneficial interest in the "policy which belonged to him from that moment. When "the death occurred, he held these rights, and the quality of "these rights was not changed by the death, which was merely "the occasion when the rights were realized. There was there-"fore no new or additional beneficial interest in the policy which "arose on the death of the appellant's father."

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[5] [1954] A.C. 257.

[6] [1953] A.C. 347.

[7] Ibid. 367.

[8] [1953] A.C. 347.

Lord Porter said[10]: "I cannot accept the view that some "fresh interest accrues to or arises in the beneficial holder of a "policy on the termination of the life insured. From the date "of the assignment to him in 1934 the appellant was the absolute "owner of the policy and, subject to payment of the premium, "entitled to receive the sum insured, with any bonus, when the "stipulated time of payment, viz., the death, had been reached. "He did not get a new interest; he obtained the fruition of the "interest which he already held. As one of your Lordships "expressed it in the course of argument, the value of the chose "in action is increased, the interest of the beneficiary is not "altered."

The *D'Avigdor-Goldsmid* case[11] differs from the present case to this extent, that in the former case the appellant had the entire beneficial interest in the policy both before and after the death of his father; but, in my opinion, the principles there stated go far to decide the present case in favour of the appellant. Nor does the matter end there. In the speeches delivered in the *D'Avigdor-Goldsmid* case[11] reference was made to *Lord Advocate* v. *Hamilton's Trustees*[12] and the facts of that case were summarized by me as follows[13]: "In that case the deceased, who died in "1936, had in 1912 settled certain policies on his life on trusts "for the benefit of his sons and daughter. The sons were to "become absolutely entitled on attaining the age of 25 and the

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[9] [1953] A.C. 347, 361.

[10] Ibid. 364.

[11] [1953] A.C. 347.

[12] 1942 S.C. 426.

[13] [1953] A.C. 347, 373–374.

" daughter's share was settled on her for life with remainders " over. The trust deed stated that these provisions in favour " of the children 'shall vest in them respectively at the date " 'hereof.' The policies became fully paid in 1914 and 1915, " and the premiums payable in the meantime were borrowed by " the trustees from the deceased. On the deceased's death, duty " was claimed under section 2 (1) (*d*) on the amount of the policy " moneys less the amount borrowed from the deceased by the " trustees in order to pay the premiums, and the claim was " rejected by the Inner House, affirming the Lord Ordinary " (Lord Keith) on the grounds (1) that in the circumstances 'the " 'property sought to be charged had not been provided by the " 'deceased,' and (2) 'that there was no beneficial interest " 'accruing or arising on the death of the deceased, in respect " 'that the whole interest in the policies had passed to the beneficiaries 24 years before the truster's death, their interest " 'having fully vested.' " I went on to say [14]: " It is unnecessary for the present purpose to consider the first of these two " grounds, but in my view the second ground was correct." I venture to quote these observations because they were approved by Lord Porter and were, I think, accepted by the other noble and learned Lords.

My Lords, it is to be observed that in *Hamilton's Trustees* [15] the daughter took a life interest in her share. I do not think it would be right to say that the decision of the Inner House in favour of the daughter was expressly approved by this House in *D'Avigdor-Goldsmid*,[16] for it was never suggested in the arguments in this House that her case might have been decided differently from the case of the sons; but, in my view, the decision in *Hamilton's Trustees* [17] was right in every respect, and I can see no real distinction between the position of the daughter in that case and the position of James Barbour in the present case. In order to ascertain what were the beneficial interests in the property provided one can only look at the settlement of March 5, 1929. The succession of beneficial interests there set out do not include any one which comes into being on the death of the settlor. Under the trusts therein declared, James Barbour was tenant for life in possession both immediately before and immediately after the death of the settlor. To quote again one sentence from the speech of Lord Porter in *D'Avigdor-Goldsmid* [18]: " He

[14] [1953] A.C. 347, 374.

[15] 1942 S.C. 426.

[16] [1953] A.C. 347.

[17] 1942 S.C. 426.

[18] [1953] A.C. 347, 364.

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"did not get a new interest; he obtained the fruition of the "interest which he already held."

Finally, my Lords, I would adopt with gratitude a passage from the judgment of Romer L.J. in the present case. After pointing out that James Barbour had received the income of the investments representing the £750 during the settlor's lifetime and that nobody had suggested that the income was wrongfully so paid, the learned Lord Justice continued[19]:

"The question arises then: By virtue of what beneficial "interest did James Barbour become entitled to receive this "income? The answer to this must surely be, by virtue of the "beneficial interest in the policy to which he was entitled under "the settlement. The next question is: By virtue of what beneficial interest did James Barbour become entitled to receive the "income of the moneys which were paid to the trustees under "the policies on the death of the settlor? The answer would "again appear to be, by virtue of the beneficial interest in the "policies to which he was entitled under the settlement.

"Does, then, the beneficial interest which entitled him to "receive the income of the last-mentioned moneys differ in "quality from the interest which entitled him to receive the "income of the £750, and would have entitled him to receive the "income of any other 'proceeds' of the policies that might have "been paid to the trustees during the settlor's lifetime? I confess "that I cannot see in what respect it does differ. The £750 and "the moneys received on the settlor's death were equally moneys "which became payable under the policies (or 'proceeds' of the "said policies) and James Barbour's right to receive the income "of both funds derived under precisely the same title, namely, "the life interest which he took under the settlement. In these "circumstances I do not for myself see how, in the words of "Lord Reid in the *D'Avigdor-Goldsmid* case,[20] it can truly be "said that 'some right or property of a different kind from that "'previously enjoyed by' James Barbour accrued or arose on the "death of the settlor."

I would allow the appeal, and answer in the negative the question asked by the originating summons.

I now turn to the second case before the House, *Wrightson* v. *Inland Revenue Commissioners*.

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[19] [1956] Ch. 452, 478–479; [1956] 1 All E.R. 627.

[20] [1953] A.C. 347, 375.

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[His Lordship stated the facts and continued:] My Lords, in my opinion, there is no good ground for distinguishing this case from the *Westminster Bank* case.

I would allow the appeal in this case also, and answer in the negative the question asked by the originating summons.

LORD REID. My Lords, I agree that policies of assurance come within the scope of section 2 (1) (*d*), and I also agree that when a settlor settles a policy, or for that matter any other "interest," he must be held to "provide" not only the policy but also the proceeds of the policy which have to be dealt with under the provisions of the settlement. The question here appears to me to be quite different from that in *Sneddon* v. *Lord Advocate*,[21] where this House had to determine what was the "property taken" by the trustees. There the property taken was determined at the time when it was taken, but it appears to me that a settlor who makes provisions for the future in a settlement must be held to provide throughout its duration the property with regard to which he gives directions. A policy is a right to claim money from an insurance company in a certain event, and if a new beneficial interest under the settlement arises after the policy money has become payable or has been paid, it appears to me that such a beneficial interest is an interest in what was provided by the settlor.

Accordingly the question in each of the present cases is whether on the death of the settlor any beneficiary acquired a beneficial interest which he did not previously have. As was explained in *D'Avigdor-Goldsmid's* case,[22] it is not enough that a beneficiary should be benefited by the death. No doubt there were reasons why that was not made the ground for liability for duty. Duty is only payable if, after the death, the beneficiary has some right different from any rights which he had before. When the settlors died no new rights against the insurance companies arose or accrued to the trustees of these settlements. Using the language of Lord Porter in *D'Avigdor-Goldsmid's* case,[23] the trustees did not then get new interests; they obtained the fruition of the interests which they already held. But it does not necessarily follow that no new beneficial interest then accrued or arose to any beneficiary under the settlements. The provisions made by a settlor may be in such a form that a new beneficial interest does accrue or arise to a particular beneficiary at the time

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[21] [1954] A.C. 257.
[22] [1953] A.C. 347.
[23] Ibid. 364.

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Lord Reid.

of the settlor's death, and the question in each of these cases appears to me to be whether, on a proper construction of each settlement, a beneficial interest did accrue or arise to the life tenants on the settlor's death. In my opinion, *Lord Advocate* v. *Hamilton's Trustees*[24] was rightly decided in all respects. In that case policies on the life of the truster were held by trustees for his four children equally. The three sons had vested rights to the capital of their shares and it follows from the decision of this House in *D'Avigdor-Goldsmid*[25] that no beneficial interest accrued or arose as regards their shares on the truster's death. The trustees were directed to hold the daughter's share for her life-rent alimentary use allenarly and on her decease to divide the amount of her share among her children equally, with further provision for the event of her dying without issue. She had no right in any event to the capital but she had a vested right of life-rent before the truster's death.

I see nothing to prevent a person having a vested right of life-rent in a subject which is not for the time being productive or capable of producing income, and if the truster has conferred such a right then it appears to me to follow from *D'Avigdor-Goldsmid's* case[25] that no new right emerges on the trust fund becoming productive of income and section 2 (1) (*d*) has no application.

It may seem unduly technical that liability for estate duty should depend on the form of the settlement and not on the fact that a financial benefit emerges on the death, but that seems to me to be inevitable once it is found, as it was in *D'Avigdor-Goldsmid's* case,[26] that " beneficial interest " in section 2 (1) (*d*) means a legal right and not a financial benefit. It must, I think, follow from the decision in that case that if a person has an immediate right both before and after the settlor's death to any income there may be from a trust fund, he acquires no new right merely because on the settlor's death the trust fund is for the first time in a position to produce income.

The provisions of the settlements now under consideration are not the same. Although I find some difficulty in construing the settlement in the *Westminster Bank* case I think that, as in *Hamilton's Trustees*,[27] no new beneficial rights arose or accrued on the settlor's death, and I therefore agree that the appeal in this case should be allowed.

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[24] 1942 S.C. 426.

[25] [1953] A.C. 347.

[26] Ibid.

[27] 1942 S.C. 426.

But I have much more difficulty in *Wrightson's* case. There the trustees are directed to hold the policies, to receive all moneys payable under them on maturity and then to divide these moneys into six equal parts. The only express gifts to the sons take the form of directions to the trustees to pay the income from these six equal parts of the policy moneys, and I find it difficult to infer from the terms of the settlement that before the death of the settlor the sons had any right with regard to the policies other than the right common to all beneficiaries, however remote the contingency in which they might take beneficial interests—the right to prevent the trustees from acting improperly and to ensure the preservation of the trust fund. It seems to me that the only beneficial interests declared by the settlement were beneficial interests in the policy moneys received by the trustees on maturity of the policies. If that be so, then beneficial interests did accrue or arise to the sons on the settlor's death and, with some hesitation, I have come to the conclusion the appeal in this case ought to be dismissed.

LORD RADCLIFFE. My Lords, I am afraid that I do not find it possible to arrive at the conclusion which, as I understand, commends itself to the majority of your Lordships. I entertain the clear opinion that the orders made by the Court of Appeal in these cases were correct. I will try to be as short as is, I think, the point itself.

In considering whether and, if so, to what extent a beneficial interest accrued or arose on the death of Sir Thomas Wrightson, Bart. (to take the *Wrightson* case) in the interest which he had purchased or provided, it seems to me that the important thing to do is to compare the beneficial interests of the sons as from the date of his death with their beneficial interests prior and up to the same date. We are, after all, considering equitable interests under a trust of personalty. Such interests consist either of the equitable ownership of property itself, such as, for instance, a life tenant's equitable ownership of the interest and dividends received by his trustees on the trust investments, or of rights to require the trustees to carry out the obligations which the trust instrument has imposed upon them with regard to managing, dealing with, or, more generally, receiving and disposing of the trust investments or the income which they produce.

In this case then, so long as the settlor was alive, no son could require anything of the trustees except that they should keep the policy documents in safe custody and do nothing else about them.

None of the sons could require them to surrender or realize the value of the policies and to turn the proceeds into income-producing investments. None of them could even demand the "enjoyment" of the trust property in the sense that a tenant for life of settled chattels can, on terms, obtain the advantages of possession. In effect, a son could do nothing except wait and watch the premiums which his father had paid to the insurance company accumulated by that company until his father died. To ask whether in that set of circumstances a son ought to be described as having a vested life interest in the trust property prior to his father's death seems to me to ask a question which, though it may conceivably be of some significance for other purposes, is without any material bearing upon the question under the Finance Act, 1894, s. 2 (1) (*d*), which is now before us.

Upon the father's death a complete change took place in the son's beneficial rights. How else is one to describe what happened? That change did not consist merely in the fact that the policy had matured. It consisted in the fact that now for the first time he would have the right to require the trustees to collect the moneys secured by the policy, to invest them as authorized by the instrument of trust and to pay over to him during his life the interest or dividends as they arose on the investments so made. Again, it seems to me an explanation that does not explain to say that all this change was merely the expression of the fact that the son had had from the first a vested life interest in the trust fund "whatever it might be" for the time being. It was the whole scheme of the settlement in question that there should not be a trust fund at all for anyone to be tenant for life of until the settlor died and the moneys fell in. Trust funds do not exist as ideal conceptions without material substance; nor, I would suppose, does the form of a settlement take shape without reference to the nature and incidents of the property that is to be the subject of settlement. When a man takes out a policy on his life and ties it up in this way it is of the essence of the arrangement that he makes and the benefits that he provides that those benefits arise on and by virtue of his death and not before.

I am sorry that an approach to the subject as simple as this does not commend itself to your Lordships. What divides us, as I understand it, is not any difference as to the legal effect of the settlement made—it is indisputable that there was to be no trust fund for a son to enjoy income out of until the settlor died and the policy moneys were got in—but a difference as to the meaning of section 2 (1) (*d*) when applied to the circumstances of this case. I cannot avoid the opinion that the application favoured by the majority of the Court of Appeal is fairly in line with the main purport of this subsection. Its general purpose, said Lord Loreburn L.C. in *Lethbridge* v. *Attorney-General*,[28] is "to prevent a man escaping estate duty by "subtracting from his means, during life, moneys or money's "worth, which, when he dies, are to reappear in the form of a "beneficial interest accruing or arising on his death." Estate duty is charged when property changes hands on death. That is the basic idea. It is also chargeable in respect of certain arrangements which produce results analogous to a change of hands on death, though not strictly amounting to such a change. I should myself have thought that the settlement of a policy of this kind in this way was a typical instance of such an arrangement.

Such a conclusion carries no inconsistency with the *D'Avigdor-Goldsmid* [29] decision of this House. The point of that case was that the provider of the policies had made a donee the sole owner of them more than five years before the date of his death. That was equivalent to an outright gift and as such was exempt from duty. No beneficial interest arose or accrued on the death.

I must add three points so as to make my position clear. The first is that I see no distinction between the policies in the *Wrightson* case and the policies in the *Barbour* case. It is irrelevant that in the second case the settlor had arranged that certain sums should be withdrawn from the policy moneys during his life and invested as part of the existing trust fund. No interest in those investments accrued or arose on his death: but an interest in the policy moneys did so arise and accrue. Why should the situation of the one determine the situation of the other?

Secondly, I am of opinion that the case of *Hamilton's Trustees* [30] was wrongly decided, in so far as it related to duty on the daughter's settled share. It seems plain that the case was argued throughout without any exploration of the question whether the considerations that bore on the liability to duty of the sons' shares were equally applicable to the liability of the daughter's share.

Lastly, I cannot understand how the words " by survivorship " in section 2 (1) (*d*) can be thought to have any connexion with the Crown's claim to duty in this case. There is no joint tenancy here. The words "by survivorship" in this subsection are, in my view, the usual words of art to denote the interest which one joint tenant takes on the death of another. So used, they have the same import as the words "by survivorship" in section 38 (2) (*b*) of the Customs and Inland Revenue Act, 1881, which is incorporated by section 2 (1) (*c*) of the Finance Act, 1894. I have never known a suggestion that they have any other meaning and, so far as I know, all the established textbooks on estate duty treat them as relating to joint tenancies. I do not think, therefore, that this case can be solved by any refining on the significance of the words "by survivorship."

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[28] [1907] A.C. 19, 23; 23 T.L.R. 123.

[29] [1953] A.C. 347.

[30] 1942 S.C. 426.

I would dismiss the appeal.

LORD KEITH OF AVONHOLM. My Lords, this is my opinion in the *Westminster Bank* case. The facts in this case have already been sufficiently stated. I only note (1) that the four several policies of assurance were assigned by the settlor to the bank, as trustee of the settlement, at the same time that there was paid to the bank as trustee the sum of £12,000; (2) that the policies were at the date of the settlement fully paid; (3) that the settlor retained no interest in the policies and that they were assigned more than five years before his death; (4) that the policies were payable on the death of the settlor; and (5) that, apart from a direction in clause 2 of the settlement that death duties "if any" in respect of the policies and the expenses of ingathering the proceeds of the policies should be paid out of these proceeds, and a direction in clause 4 that the policies and their proceeds were not to be treated as income bearing until the amounts payable in respect thereof shall have been received and invested, no distinction was made as to the purposes to which the policies, the sum of £12,000, and their fruits should be applied.

A question was raised whether a policy of assurance could be an interest provided by a settlor within the meaning of section 2 (1) (*d*) of the Finance Act, 1894. I agree with the opinions already expressed that an interest provided can take the form of a policy of assurance and I do not have anything to add on this point.

The other question for determination is whether under the terms of the settlement a beneficial interest has accrued or arisen by survivorship, or otherwise, on the death of the settlor, in the policies (an interest provided by the settlor), within the meaning of section 2 (1) (*d*) of the Finance Act, 1894. I draw no distinction between the policies and their proceeds. If a beneficial interest arose in the proceeds at the death, it arose, I think, in the policies at the death, and if it did not arise in the policies at the death, it could not, as I see it, arise in the proceeds at the death. This, I should have thought, was clear, because the first thing to look for is the interest provided by the settlor. The settlor cannot, as I see it, provide two things which have to be separately considered—(1) the policies, and (2) the proceeds. Whatever he provided he provided at the date of the settlement and that was undoubtedly the policies, but inherent in the policies was the right to obtain the sums covered by the policies at the due date. So when it is said he provided the policies it can also be said he provided the proceeds produced by the policies. These are two ways of saying the same thing. What did the settlor put in trust? Surely the policies. If not, how could the trustees realize the policies? When the settlor died there were no proceeds in existence but there were policies in existence by virtue of which the trustees were enabled to obtain the proceeds. If the policies are to be distinguished from the proceeds I have difficulty in seeing how a beneficial interest can ever accrue or arise by survivorship, on the death, in the proceeds, because the proceeds are not there at the death. I would observe also that it is the interest provided that is to be deemed to pass at the death, but the value of this interest is quantified, for the purposes of duty, by the extent of the beneficial interest accruing or arising by survivorship at the death. This is noted, for example, by my noble and learned friend, Lord Morton of Henryton, in *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners*[31] in commenting on *Attorney-General* v. *Dobree*,[32] by Lord President Normand and Lord Fleming in *Tennant's Trustees* v. *Lord Advocate*,[33] and by the Court of Appeal in *Westminster Bank Ltd.* v. *Attorney-General*.[34] If no beneficial interest accrues or arises by survivorship on the death, then the interest provided, even if it is assumed to pass at the death, attracts no liability to duty. In short, the beneficial interest must be in the interest provided, which, in this case, in my opinion, is the policies with all the rights inherent in the holding of that particular type of asset. If there is no beneficial interest in the policies arising by survivorship on the death, there is no liability to duty. No point was taken on the words " or otherwise " in the statute, so attention may be confined to the words " by survivorship."

[31] [1953] A.C. 347, 368.

[32] [1900] 1 K.B. 442; 16 T.L.R. 80.

[33] 1938 S.C. 224, 229–233.

[34] [1939] Ch. 610, 619; [1939] 2 All E.R. 72.

My Lords, I can see no reason for thinking that a beneficial interest accrued or arose in the insurance policies or their proceeds at a different time from the beneficial interest that accrued or arose in the sum of £12,000, or its accumulations. There is accordingly no room, in my opinion, for holding that a beneficial interest accrued or arose in the policies by survivorship of the settlor. £750 of the sums assured was paid during the lifetime of the settlor. But I attach no significance to that specialty. That was the result of the contract between the settlor and the insurance company. The balance of the sums assured became payable on the death of the settlor.

As I understood the argument for the Revenue, it was that where an insurance policy on a settlor's life had to be held by trustees until the death of the settlor, so that a life-tenant could not enter into enjoyment of the life-interest of the proceeds of the policy until the settlor's death, a beneficial interest arose or accrued in the life policy to the life-tenant on the death of the settlor. As it was put, if the life-tenant could not demand of the trustees that the policy should be converted into an interest-bearing asset during the lifetime of the settlor, there was in the life-tenant only an interest in expectancy, which became an interest in possession of the life-tenant on surviving the settlor. This, it was said, was a beneficial interest in the policy provided, accruing or arising by survivorship on the death of the settlor.

My Lords, this seems to me to make the question turn, not upon the terms of the settlement, but upon the nature of the asset put into the settlement. I am unable to accede to this argument. It was recognized, I think, that the argument could hold only where the interest provided in the policy was a life-interest. Where the interest provided is an absolute indefeasible interest in the proceeds of the life policy to be paid over by trustees to the person absolutely entitled on the death of the settlor, it has been decided by this House in *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners* [35] that no beneficial interest arises on the death of the settlor. It would be a remarkable thing, in my opinion, that where the right at the death is cut down to a life-interest a different result should follow. In *Lord Advocate* v. *Hamilton's Trustees* [36] a father had placed in trust during his lifetime certain policies of insurance on his life and whole sums of money to be derived therefrom to be held for behoof of three sons and a daughter. The sons were to take each a quarter of the proceeds of the policies at his death, but the daughter was restricted to a life-rent of a quarter of the proceeds with fee to her issue. It was held that no estate duty was exigible on the death of the truster on the proceeds of the policies. In that case no argument was directed to showing that there was a difference in respect of the sons' shares and in respect of the daughter's share. It is not, I think, correct to say, as suggested by Harman J. and the Master of the Rolls in the present case, that the position of the daughter may have been overlooked. As no point was specifically made of a possible distinction between sons' shares and daughter's share, the court had not the benefit of any argument similar to that addressed to your Lordships, but the position of the daughter was quite clearly taken notice of by the court and it is, I think, plain that it did not occur to the judges who took part in that decision that any distinction fell to be made between sons and daughter. In light of the argument for the Revenue in this appeal I have carefully reconsidered that case and I think the decision was right.

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[35] [1953] A.C. 347.

[36] 1942 S.C. 426.

I would examine the argument, however, more fully. It is obvious, in the circumstances postulated, that if the life-tenant fails to survive the settlor, he will get no enjoyment of what has been provided for him. That of itself seems to me to be a circumstance of little importance. It might be said to be merely a matter of degree. If he survives the settlor he may live to enjoy his life-interest only for a day, or a week, or a month. A person absolutely entitled may also not survive to enjoy the benefit provided. The benefit, it is true, in the fullness of time will fall into his estate, or he may sell it during his life and before the settlor's death, suitably discounted. But these are differences due to the nature of the interest provided. The one must bear full fruit; the other may wither in the bud. If the life-tenant survives to enjoy what has been provided he takes, not by virtue of a beneficial interest accruing or arising by survivorship, but because the interest provided has begun to bear fruit.

Various situations may be conceived which seem to me to disclose the essential unsoundness of the Revenue's contention. For example, if a father purchased a life-annuity in favour of his son, payment commencing on the son attaining the age of 50, and delivered the policy to the son, it is clear that the father has provided an interest, or benefit, for his son. On the son attaining the age of 50, some 20 or 30 years later it may be, it would not seem possible to say that the nature of the benefit conferred had changed its character, or that the son has acquired a new benefit. Yet this might be said to be an interest in expectancy which has become an interest in possession. But that is merely to describe the nature of the interest given. The nature of the interest provided was fixed once and for all when it was originally conferred. The same would hold good, in my opinion, where the annuity was to commence on the death of the father. That event merely fixes the date of the maturity of the policy. It will be observed that this illustration would fall exactly under the opening words of subsection 2 (1) (*d*)—an "annuity . . . purchased or provided by the deceased." But it is not caught, in my opinion, by the concluding words of the subsection, "to the extent of the beneficial interest accruing or arising by survivorship . . . on the death of the deceased." The beneficial interest would arise, in my opinion, not by survivorship, but by virtue of the contract made with the insurance company when the policy was taken out, fixing the commencement date of the annuity as the date of the deceased's death. It is not, in my opinion, possible to distinguish this case from a case where any other date for commencement of the annuity is stipulated for in the policy. My noble and learned friend, Lord Reid, I think recognized this in *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners*.[37]

So far I have taken the illustration of an annuity policy taken out by the deceased without the interposition of a trust. But it does not appear to me to make any difference that a settlor, wishing to secure that the life-interest in a policy maturing at his death shall go to A and the capital to B, assigns the policy to trustees of the settlement. If the life-tenant is given an immediate indefeasible interest in the income of the trust fund whenever it may arise, the fact that part of that income will not arise until the death of the settlor does not, in my opinion, mean that in respect of that part he has acquired a beneficial interest by survivorship if he survives the settlor. In my opinion, this case is entirely within the ratio of the decision in *D'Avigdor-Goldsmid*.[38] All the rights which the life-tenant had under the settlement were created at and from the date of the settlement and were indefeasible. At the death nothing happened to change the nature of these rights. To quote the words of Viscount Simon in the case cited[39]: "When the death occurred, he held

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[37] [1953] A.C. 347, 377.

[38] [1953] A.C. 347.

[39] Ibid. 361.

" these rights, and the quality of these rights was not changed " by the death, which was merely the occasion when the rights " were realized. There was therefore no new or additional " beneficial interest in the policy which arose on the death of the " appellant's father." Similar language was used by my noble and learned friend, Lord Morton of Henryton, and others of their Lordships who took part in the *D'Avigdor-Goldsmid* case.[40]

The passage I have quoted from the speech of Lord Simon, in my opinion, exactly covers this case. The rights given in the insurance policies were the same in character as those given in the sum of £12,000, and both were given at the same time. The only difference is that the times of realization were different. What was provided by the settlor was the right under the policy to go against the insurance company, through the trustees, at the due date, in order to realize the sum out of which the life-tenant would secure his life-interest, and this right existed without change from the beginning of the settlement. The enforcement of a right cannot create a beneficial interest arising by survivorship.

For the reasons given I would allow the appeal.

My Lords, in *Wrightson's* case I reach the same conclusion. I had at first some doubt whether this case could not be distinguished from the case of the *Westminster Bank* on the view that no beneficial interest accrued or arose in the policies to anyone until the death of the settlor. I am now satisfied, however, that from the time the policies were assigned to the trustees there was a beneficial interest in the policies in the group of persons who were ultimately to take as life-tenants on the death of the settlor and that this beneficial interest remained unchanged in character from the date of the settlement. The case is accordingly, in my opinion, indistinguishable from the case of the *Westminster Bank*. I would allow the appeal.

Appeals allowed.

Solicitors: *Parker, Garrett & Co.; Herbert Smith & Co.; Solicitor of Inland Revenue.*

F. C.

[40] [1953] A.C. 347.

[HOUSE OF LORDS.]

H. L. (E.)* A. C. BILLINGS & SONS LTD. . . . APPELLANTS;

AND

RIDEN . . . . RESPONDENT.

1957
June 18,
19, 20;
July 25.

Negligence—Contractor—Duty to licensee—Duty to residents in and visitors to premises—Work in progress—Normal means of access made impassable—Dangerous alternative route—Injury to visitor using it—Liability.

NB Liab
Occup[illegible] 1957
[illegible]

Contractors reconstructing the front approach to a house in which lived a caretaker and his wife, so obstructed the normal approach that it became impassable. Their workmen suggested to the caretaker's wife that persons might go in and out of the house by using the forecourt of the house next door, a route involving danger because it led through a narrow way between bushes and the unfenced sunk area of the house. On a November evening after dark the respondent, a woman of 71, visiting the caretaker and his wife by invitation, used that way in on the wife's suggestion. In leaving by the same way, after declining an offer to escort her, she fell into the area next door sustaining injuries:—

Held, that the contractors had been negligent and were liable in damages to the respondent, who, although she was guilty of contributory negligence, did not act unreasonably in attempting to use the alternative means of egress.

The contractors owed a duty to all persons who might be expected lawfully to visit the house to take such care as was, in all the circumstances, reasonable to ensure that they were not exposed to danger. Where, as here, the respondent was aware of the danger but, in all the circumstances, a reasonable person would have risked incurring it, the contractors were not absolved from liability either by giving a warning or by reliance on the respondent's knowledge. In considering what a reasonable person would realize or would do in a particular situation, regard must be had to human nature, and if, in that situation, the great majority of people would behave in one way, it is not right to say that a reasonable man would have behaved in another.

Per Lord Keith of Avonholm. A contractor is not normally liable for a danger not of his own creation on adjacent property with which he has no right to interfere, but if, as here, he does not provide a reasonably safe approach to a house he may be liable if a person, attempting to enter or leave the house, is precipitated into the danger on the adjacent property.

Clayards v. *Dethick* (1848) 12 Q.B. 439 applied.

Malone v. *Laskey* [1907] 2 K.B. 141; 23 T.L.R. 399 and *Ball* v. *London County Council* [1949] 2 K.B. 159; 65 T.L.R. 533;

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD COHEN, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

[1949] 1 All E.R. 1056 overruled in so far as they dealt with negligence.

Decision of the Court of Appeal (sub nom. *Riden* v. *A. C. Billings & Sons Ltd.*) [1957] 1 Q.B. 46; [1956] 3 All E.R. 357 affirmed.

APPEAL from the Court of Appeal (Denning and Birkett L.JJ., Roxburgh J. dissenting).

This was an appeal, by leave of the Court of Appeal, from an order of that court dated July 26, 1956, whereby it varied the judgment of Hallett J. sitting at Gloucester Assizes without a jury on February 6 and 7, 1956. By his judgment he found in favour of the appellant company, A. C. Billings & Sons Ltd., who were then first defendants, and of the Ministry of Works and the Commissioners of Customs and Excise, who were then second and third defendants respectively, with no order as to costs. The Court of Appeal held that the respondent, Ethel Maud Riden, a widow, 71 years of age, had contributed to her own damage to the extent of 50 per cent. and ordered that judgment be entered for her against the appellant company for £611 8s. 6d. with costs, such costs to include any increase of costs by reason of there being three defendants, and that the judgment in favour of the second and third defendants be affirmed. A notice of appeal against the second and third defendants had been lodged but was early abandoned, so that they did not appear in the Court of Appeal. The court further ordered that the appellant company be at liberty to lodge a petition of appeal to the House of Lords, counsel for the appellant company having stated that, in the event of such an appeal, the appellant company would not seek to disturb the order made in the Court of Appeal as to costs or ask for an order for costs in the House of Lords.

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The facts, stated by Lord Reid, were as follows: The respondent sued the appellants, of firm of contractors, for damages for injuries sustained by her through falling into an unfenced sunk area when she was leaving No. 25, Cambray, Cheltenham, at about 10 p.m. on November 17, 1953. This house was part of a terrace set back some 30 feet from the street. Prior to November 16 the access to the front door had been a long sloping ramp with a railing on each side. The original access had been a level path leading to four or five steps up to the front door, but, many years before, an occupier of the house who used a wheeled chair had had the path and steps covered by the ramp. In 1953 the

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house was used as a government office, and caretakers, Mr. and Mrs. Privett, lived on the top floor. The respondent had been visiting Mrs. Privett before her accident.

It had been decided by the Ministry of Works to restore the original form of access and remove the ramp, and the appellants were employed as contractors to do this. They started work on November 16 and by the afternoon of November 17 they had removed the part of the ramp nearest the street and had laid down a foundation of rough stones for the new level path: they had also covered the small lawn belonging to No. 25 with materials and tools. It was, therefore, impracticable to approach the front door over any part of the ground belonging to No. 25. Looking from the street towards the house the lawn was on the right and the boundary with No. 26 was immediately to the left of the ramp. The boundary railings had been removed during the last war and a row of shrubs ran along most of the boundary. The only practicable approach to the front door of No. 25 from the street was to go up the forecourt of No. 26 on the other side of the shrubs and then to pass between the last shrub and the front wall of the houses over some muddy ground and to step up two or three feet from it on to the ramp near the front door of No. 25. In taking this route it was necessary to go within a very few feet of the small sunk area of No. 26 which was unfenced and at the same time to brush past the branches of the last shrub. This route had been made possible by the appellants having removed the railings at the sides of the ramp. They had replaced the railings by a wooden board on the right side of the ramp but had left open the left side of the ramp nearest to No. 26.

When the appellants' workmen ceased work about 4.30 on November 17 they did nothing to provide a safe or convenient access to No. 25. The defence at the trial was that an access had been provided by means of a plank walk, but this was denied by the respondent and her witnesses and the defence witnesses were not believed by Hallett J., the trial judge. At about 3 p.m. on the day of the respondent's accident Mrs. Privett came out of her house by this route between the shrub and the sunk area and over to the ground of No. 26 and asked the workmen: "How "are we going to get in and out?" and she says that they told her "we can always go" on the No. 26 side, and that that side was the best way in. Apparently one of the workmen also went upstairs to see Mr. Privett. Admittedly it was the best way in, in the circumstances. Hallett J., summarizing Mrs. Privett's evidence, said: "Then she says further that . . . she herself was "advised by the first defendants' workmen that that was the "best way to go"; and earlier in the judgment he had referred to "Mrs. Privett's allegation that she had been advised to use "the way she did use," and said that he accepted her evidence without hesitation.

Some time after Mrs. Privett returned, her brother Mr. Brown, who is a builder, came with his wife to visit her. He found that the ramp had gone and when he was looking for an alternative access Mrs. Privett called to him and advised him to go by the route which she had taken herself. Mr. Brown found that the ground near the bush was muddy and brought over a plank which he put down to enable his wife to cross.

About 7 p.m. the respondent and her daughter were walking along the street. Mrs. Privett saw them and invited the respondent to come in, again advising her to go by the same route. The respondent made the journey without much difficulty. About 10 p.m. she left. Mrs. Privett's son offered to accompany her but she thought that unnecessary. She took no precautions such as getting a torch, and after waiting a moment on emerging from the house to accustom her eyes to the darkness she stepped down off the ramp on to the plank. She had no recollection of what happened then, but she fell into the sunk area and sustained considerable injuries.

In her evidence the respondent said that she used to visit the Privetts quite often at No. 25, Cambray. Describing how she approached it on the occasion in question through the ground of No. 26, she said: "I could not get through the bushes until I "came up to the last bush . . . I saw I could get up through "the last bush, and I got up through there." Subsequently the following passage occurred in her examination-in-chief: "Q. You "had to step, I imagine, from the plank onto the ramp? A. Yes. Q. I wonder how high you put it in steps. Can you put it in "inches or feet? A. Two or three feet; something like that, I "should say it was—three feet." She said that there was no railing on the left of the ramp to stop one falling off it into the basement. In relation to her fall after leaving the house the following passage occurred in cross-examination: "Q. Then did "you get onto the plank? A. I just stepped on it and fell. "Q. Do you mean that you fell immediately that you stepped "onto the plank? A. Yes. Q. So you had not taken more "than one step on the plank? A. Only one step on the plank. "Q. That was quite away from the area, was it not? A. Not so "very far. I could not say how far it would be." Subsequently she said that there was no fencing round the area and that she had never seen any.

Mrs. Privett in evidence said that she and her husband were caretakers at No. 25, Cambray, for the Commissioners of Customs and Excise. There were formerly railings running on either side of the front door to the pavement. The workmen took down the railings. She said that the step down from the ramp at the material point was between two and three feet. There was, she said, a back door to the building which was locked at 5 p.m. Mrs. Brown in evidence estimated the step down from the ramp at three feet.

It was dark when the respondent entered the house and Hallett J. held that there was no appreciable light from the street lamps.

Norman Fox-Andrews Q.C. and *Robert Hutton* for the appellant company. When by an act or omission of A his neighbour is exposed to a danger created by A on premises where he is working, but his neighbour sees and avoids the danger on the route which he was contemplating taking and thereafter, in taking a different route on other premises, encounters and suffers injury from a different peril of which he is also aware, A cannot be legally liable for that injury.

Assuming that A is under a duty to the injured person, what is the extent of that duty? Does the fact that A recommended the route, which the injured person took, as being the best enlarge his liability? In the circumstances, the route recommended to the respondent was in fact the best.

In every case to which the majority of the Court of Appeal referred there were two characteristics which it is relevant to consider here: (1) The peril in question through which the plaintiff was injured had been actually created by the defendant. (2) The injury was always sustained at a place where the defendant was actually working or had been working: see *Clayards* v. *Dethick*[1]; *Corby* v. *Hill*[2]; *Haseldine* v. *C. A. Daw & Son Ltd.*[3]; *Mooney* v. *Lanarkshire County Council*[4]; *Brown* v. *T. and E. C. Cotterill*[5]; *Clelland* v. *Edward Lloyd Ltd.*[6]; *Simmons* v. *Bovis Ltd.*[7]; *Buckland* v. *Guildford Gas Light and Coke Co.*[8]; *Davis* v. *St. Mary's*

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[1] (1848) 12 Q.B. 439.

[2] (1858) 4 C.B.N.S. 556.

[3] [1941] 2 K.B. 343; 58 T.L.R. 1; [1941] 3 All E.R. 156.

[4] 1954 S.C. 245.

[5] (1934) 51 T.L.R. 21.

[6] [1938] 1 K.B. 272; 53 T.L.R. 644; [1937] 2 All E.R. 605.

[7] [1956] 1 W.L.R. 381; [1956] 1 All E.R. 736.

[8] [1949] 1 K.B. 410; [1948] 2 All E.R. 1086.

Demolition and Excavation Co. Ltd.[9]; *Creed* v. *McGeoch & Sons Ltd.*[10]; *Dunster* v. *Abbott*[11] and *Slater* v. *Clay Cross Co. Ltd.*[12]

See also *Hawkins* v. *Coulsdon and Purley Urban District Council*,[13] *Greene* v. *Chelsea Borough Council*[14] and *Slater* v. *Clay Cross Co. Ltd.*,[15] *per* Denning L.J. The change in the law of contributory negligence has not transferred the question of knowledge from the sphere of duty to that of apportionment of blame.

The extent of the appellants' duty was at most to give warning of the danger at No. 25. There was no duty to provide a safe alternative route. So long as the warning to a person unaware of the facts was adequate, that was enough. Here the appellants did give adequate warning of the danger which they had created, though not of the danger at No. 26. Their duty to the respondent was that of a licensor to a licensee and it ceased once she was aware of all the relevant facts, because then any breach of duty cannot have been the cause of the accident. With full knowledge of the danger, she chose to incur it and therefore did so at her own risk. The appellants cannot be responsible for the danger at No. 26, because they had no right to remove it or even to enter on those premises. It was outside their control. As the trial judge found as a fact, the respondent's own fault was the sole cause of the accident. She was not incarcerated in the house, since she could have used the back door. Whatever was said by the workmen could not increase the legal liability of the appellants. One should be extremely cautious of accepting what Denning L.J. said on this point in the Court of Appeal.[16] The present case does not come within *Clayards* v. *Dethick*[17] as interpreted in *Thompson* v. *North Eastern Railway Co.*[18]

No one has previously tried to make contractors liable in circumstances such as these.

George Baker Q.C. and *Michael Kempster* for the respondent. It is submitted: (1) There is a duty to use reasonable care to prevent damage to one's neighbour, and it is understood that the appellants concede this. (*a*) Who are one's neighbours?

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[9] [1954] 1 W.L.R. 592; [1954] 1 All E.R. 578.

[10] [1955] 1 W.L.R. 1005; [1955] 3 All E.R. 123.

[11] [1954] 1 W.L.R. 58; [1953] 2 All E.R. 1572.

[12] [1956] 2 Q.B. 264; [1956] 2 All E.R. 625.

[13] [1954] 1 Q.B. 319, 333–334; [1954] 1 All E.R. 97.

[14] [1954] 2 Q.B. 127, 139; [1954] 2 All E.R. 318.

[15] [1956] 2 Q.B. 264, 271.

[16] [1957] 1 Q.B. 46, 58; [1956] 3 All E.R. 357.

[17] 12 Q.B. 439.

[18] (1860) 2 B. & S. 106, 114–115.

Here they are the persons who may reasonably be expected to be affected by the contractors' work. (*b*) What is the contractors' duty in this case? It is not limited territorially or topographically. It is not limited merely to the giving of a warning. (2) The respondent's knowledge is not a bar to her recovering damages. This raises other subsidiary questions: (*a*) What was her knowledge? (*b*) What is the effect of the change of the law relating to contributory negligence? (*c*) With the knowledge she possessed, was she exposing herself to the danger so much in breach of common and ordinary prudence, in the circumstances, as to make the accident entirely her own fault? (*d*) Had she freedom of choice in the sense intended by *Clayards* v. *Dethick*[19]?

As to the question: Who are neighbours? the Privetts were within the contractors' purview. But what about the milkman, the newspaper boy and tradesmen whom, as a matter of ordinary common sense, a contractor would realize would be wanting to enter and leave the premises? What about visitors, who may be old or young? What is it reasonable for a contractor to contemplate in regard to them? It is reasonable for him to have their passage in contemplation. If a man has in his larder food unfit for human consumption and has a son who brings home young friends late at night after his parents have retired, and one of the young people goes to the larder and eats the food, that is something which one would say should have been in the contemplation of the father. *Bourhill* v. *Young*[20] helps the respondent on this point.

As to the extent of the contractors' duty, discussion of the duties of licensors and licensees, of invitors and invitees bedevil this matter. There is a higher duty on the contractor than on the licensor. The licensor's duty may be merely to warn and he may be under no duty to trespassers. But *Creed* v. *McGeoch & Sons Ltd.*[21] shows that the contractor's duty is higher: see also *Haseldine* v. *C. A. Daw & Son Ltd.*[22] and *Excelsior Wire Rope Co. Ltd.* v. *Callan.*[23]

The contractors created a dangerous state of things when they destroyed the lower part of the ramp and littered the garden with rubble. But for their action the accident would not have happened. The existence of the back door did not play a great part in the trial. It is really in the nature of a "red herring" and was not investigated at the trial. It is not known who locked that door or whether the Privetts had a key. If it was usable, the contractors might have put up a notice directing people to it. Instead, they actually encouraged the use of the route taken by the respondent. They advised its use and are bound by their advice. Once a contractor has created a dangerous situation he is responsible for taking reasonable care to prevent damage: see *Mooney* v. *Lanarkshire County Council.*[24] This general duty could not be discharged by the appellants simply by warning the respondent that there was a sunk area in the next-door premises, though in fact the appellants never did give such a warning. A warning must be adequate. As to warnings, see Smith's Leading Cases, 13th ed., pp. 858–859. Here the danger of which warning should have been given cannot be limited to the premises on which the work was being carried on; it must extend to the alternative route and the warning should have been precise: see Winfield on Torts, 6th ed., p. 518.

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[19] 12 Q.B. 439.

[20] [1943] A.C. 92, 110; [1942] 2 All E.R. 396.

[21] [1955] 1 W.L.R. 1005.

[22] [1941] 2 K.B. 343.

[23] [1930] A.C. 404.

The respondent's own knowledge of the danger was not a bar to her recovering damages, because she did not know the full extent of the danger. There is a distinction between a warning and knowledge. Despite what Bramwell L.J. said in *Lax* v. *Darlington Corporation,*[25] the law was properly stated in *Clayards* v. *Dethick.*[26] The respondent's knowledge did not relieve the contractors of their duty to make a reasonably safe access to the premises. The respondent's knowledge of the existence of the sunk area can be nothing more than an element in considering whether or not she was guilty of contributory negligence.

As to the change in the law effected by the Law Reform (Contributory Negligence) Act, 1945, the respondent's argument was never meant to suggest that it created a new cause of action where none existed before or that any duty was enlarged. Once there is a cause of action one must consider the knowledge and the behaviour of the plaintiff to see to what extent it may reduce, or whether it may extinguish, the amount of the damages recoverable. But those considerations do not arise until a cause of action is established. What was said in *Slater* v. *Clay Cross Co. Ltd.*[27] is adopted. What was said in Salmond on Torts, 10th ed., p. 39, as to volenti non fit injuria was amended in the next edition at p. 48 in the light of the Act of 1945. As to the law before the Act, see *Kimber* v. *Gas Light and Coke Co.*[28]

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[24] 1954 S.C. 245.

[25] (1879) 5 Ex.D. 28, 34–35.

[26] 12 Q.B. 439.

[27] [1956] 2 Q.B. 264, 271.

[28] [1918] 1 K.B. 439; 34 T.L.R. 260.

and Smith's Leading Cases, 13th ed., vol. II, pp. 333–334, 335. *Hawkins* v. *Coulsdon and Purley Urban District Council* [29] indicates that in the matter of knowledge one cannot apply so strict a test to a visitor as to an occupier who knows the premises better. See also *Greene* v. *Chelsea Borough Council* [30]; *Robson* v. *North Eastern Railway Co.*[31]; *Rose* v. *North Eastern Railway Co.*[32]; *Thompson* v. *North Eastern Railway Co.*[33] and *Lee* v. *Nixey.*[34]

As to the respondent's freedom of choice, if she had none, she cannot be said to have made the return journey recklessly. The contractors should have considered what visitors to the house would be likely to do. One cannot tell what would be the course of each particular visit, so the contractors would have to contemplate that persons would want to go in and out. If, as a result of their operations, the respondent had been confined in the house all night, she would have had an action for false imprisonment. Once she was in the house she had to be able to get out: see *Wyatt* v. *Great Western Railway Co.*,[35] *London Graving Dock Co. Ltd.* v. *Horton* [36] and *Greene* v. *Chelsea Borough Council.*[37]

One always comes back to the same question: Was it the contractors' negligence that caused the accident, or the respondent's own rashness, or a combination of both?

Norman Fox-Andrews Q.C. in reply. There is no reason for the House of Lords to find facts other than those found by the trial judge. The respondent knew of the danger and appreciated it, and the majority of the Court of Appeal were wrong in applying a subjective test and finding that the respondent did not appreciate the danger.

The contractors were not under any greater liability than that of a licensor to a licensee: see *Creed* v. *McGeogh & Sons Ltd.*[38] and *Thomson* v. *Cremin.*[39] Assuming that *Clayards* v. *Dethick* [40] was rightly decided, it is distinguishable from the present case by reason of essential differences. Admitting the existence of a duty to take reasonable care, the performance of the duty is complete if the contractors give a warning to a person who did not already know of the danger. But here any failure to give a warning is immaterial because such a warning would not have told the respondent anything she did not already know.

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[29] [1954] 1 Q.B. 319, 333–334, 335–336.

[30] [1954] 2 Q.B. 127, 137–138.

[31] (1875) L.R. 10 Q.B. 271, 274.

[32] (1876) 2 Ex.D. 248.

[33] 2 B. & S. 106, 114.

[34] (1890) 63 L.T. 285.

[35] (1865) 6 B. & S. 709, 719–720.

[36] [1951] A.C. 737, 747; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.

[37] [1954] 2 Q.B. 127, 139.

[38] [1955] 1 W.L.R. 1005.

[39] (1941) [1956] 1 W.L.R. 103n.; [1953] 2 All E.R. 1185.

[40] 12 Q.B. 439.

Their Lordships took time for consideration.

July 25. VISCOUNT SIMONDS. My Lords, in this case I have had an opportunity of reading the opinion of my noble and learned friend, Lord Reid, and, as I concur in it, I do not think it necessary to add any words of my own.

I shall move that this appeal be dismissed with costs.

LORD REID stated the facts and continued: My Lords, the main controversy in the case has been over the nature and extent of the duty owed by the appellants to the respondent. The appellants maintain that their duty was no higher than that of a licensor to a licensee and in particular that their duty ceased once a visitor had become aware of all the facts constituting the danger. They contend that their only duty was to give adequate warning to a person who was unaware of those facts. Admittedly they did not warn the respondent but, as the respondent knew all the facts when she left the house, they say that giving a warning to her was unnecessary. Hallett J. assumed rather than decided that, because the respondent was a licensee vis-à-vis the occupiers, her rights against the appellants were only the rights of a licensee in a question with an occupier. In this I think he was wrong; but it may well be that this point was not fully argued, or not argued at all, before him. On all other matters in the case his judgment was full and detailed and I see no reason to disagree with it on any of these other points. It may well be that this matter was overlooked, because in addition to the appellants the respondent sued the occupiers and against them, of course, her rights were limited to the rights of a licensee.

It is not alleged that the appellants were authorized by the occupiers to prevent safe access to the house at times when their men were not working, and it is plain that the nature of their work did not require this because the defence which they sought to establish at the trial was that they had in fact provided a safe access by means of a plank walk. The only reasonable justification I know of for the rights of a licensee being limited as they are is that a licensee generally gives no consideration for the rights which the occupier has given him and must not be allowed to look a gift horse in the mouth. That cannot apply to the appellants, who gave no concession to the respondent. I need not

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pause to consider what the position would be if an occupier authorized a contractor to prevent safe access for a licensee. In the present case I see no reason why the contractor who chooses to prevent safe access by visitors should be entitled to rely on any speciality in the law of licensor and licensee.

In my opinion, the appellants were under a duty to all persons who might be expected lawfully to visit the house, and that duty was the ordinary duty to take such care as, in all the circumstances of the case, was reasonable to ensure that visitors were not exposed to danger by their actions. It was argued that, even so, that duty was adequately discharged in all cases by giving warning of the danger and that, if a visitor in full knowledge of the danger chose to incur it, she did so at her own risk and that the contractor cannot be held liable. I do not agree. There may be many cases in which warning is an adequate discharge of the duty. There may be another safe and reasonably convenient access only a short distance away or the situation may be such that, with knowledge of the danger, the visitor can easily and safely avoid it. But there are other cases where that is not so. Let me take the example of a doctor called to an urgent case in a house the only access to which has unnecessarily been made dangerous by the contractor. It cannot be right that he should be entitled to say to the doctor: "Now I have shown you the "danger and if you choose to go on you do so at your own risk."

I do not think that there is anything new in what I have just said. The principle was at least adumbrated a century ago in *Clayards* v. *Dethick*.[1] A cab proprietor had stables in a mews from which the only road to the street was a long narrow passage. The Commissioners of Sewers employed the defendants to open a trench along the passage and gave notice to the occupiers of stables in the mews that the trench would be open for a day or two and that they must put up with it: the notice advised them to get other stables. The part of the passage not excavated was obstructed by earth and gravel thrown out from the trench. The cab proprietor safely led out one of his horses but the next fell into the trench owing to the earth and gravel giving way. The danger was obvious and there was evidence that a warning had been given, but the case was left to a jury and the cab proprietor succeeded. Lord Denman C.J. in the first place left it to the jury to say whether the defendants had been guilty of negligence and then observed [2] "that it could not be the plaintiff's duty to

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[1] (1848) 12 Q.B. 439.

[2] Ibid. 442–443.

"refrain altogether from coming out of the mews merely because "the defendants had made the passage in some degree "dangerous: that the defendants were not entitled to keep the "occupiers of the mews in a state of siege till the passage was "declared safe, first creating a nuisance and then excusing them- "selves by giving notice that there was some danger: though, if "the plaintiff had persisted in running upon a great and obvious "danger, his action could not be maintained."

On a rule nisi Patteson J. said[3]: ". . . the defendants had "clearly no right to leave a trench open in the passage to this "mews without a proper fence, and, having done so, to tell the "plaintiff: 'You shall keep your horse in the stable till we "'inform you that you may remove him.' But whether or not "the plaintiff contributed to the mischief that happened by want "of ordinary caution, is a question of degree. If the danger was "so great that no sensible man would have incurred it, the verdict "must be for the defendants . . . The whole question was, whether "the danger was so obvious that the plaintiff could not with "common prudence make the attempt." Coleridge J. said[4]: "The question is, not only whether the defendants did an "improper act, but also whether the injury to the plaintiff may "legally be deemed the consequence of it . . . The plaintiff was "not bound to abstain from pursuing his livelihood because there "was some danger. It was necessary for the defendants to show "a clear danger and a precise warning." Wightman J. said[5]: "If it had appeared that the plaintiff, in defiance of warning, "would persevere in the attempt to pass, I cannot suppose that "the jury would have found a verdict in his favour." Lord Denman C.J. added[6]: "I certainly told the jury that the plaintiff "was not bound to keep his horse back unless the danger was "imminent."

As I read these judgments, Lord Denman C.J. and Patteson J. did not think that a warning would exculpate the defendant if the danger was not so great or immediate that, on its being pointed out, no sensible man would have incurred it. The judgments of Coleridge and Wightman JJ. can be read as indicating an opinion that warning would be sufficient, but Coleridge J. at least adds the qualification that the danger must be clear and the warning precise. Neither says expressly that, if the danger was only such that a reasonable man, though warned, would still go on, still a warning would be sufficient to exclude any liability on the defendant.

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[3] 12 Q.B. 439, 446.

[4] Ibid. 446–447.

[5] Ibid. 447.

[6] Ibid. 448.

In *Thompson* v. *North Eastern Railway Co.*[7] Cockburn C.J. stated his understanding of the decision in *Clayards'* case[8] in these terms: "*Clayards* v. *Dethick*[8] is a direct authority that "where danger has been created by the wrongful or negligent "act of another, if a man, in the performance of a lawful act, "voluntarily exposes himself to that danger, he is not precluded "from recovering for injury resulting from it, unless the circumstances are such that the jury are of opinion that the exposing "himself to that danger was a want of common or ordinary "prudence on his part. Now that issue was not proposed by the "defendants [in *Thompson's* case[9]] to be put to the jury. They "stood upon the fact that the knowledge of the state of the basin "by the pilot was the knowledge of the plaintiffs, and was in "point of law an answer to their claim. But that is not so, unless "the circumstances were such that the attempt to navigate the "ship under them was an act which no man of ordinary prudence "would have committed." Blackburn J. said[10]: "On this "point I perfectly concur with what has been said by the Lord "Chief Justice and my brother Hill; the point is, in fact, decided "by *Clayards* v. *Dethick*.[11] It might have been a question to "be left to the jury, whether the pilot, with the knowledge which "he possessed, was guilty of such want of reasonable care, in "attempting to take the ship out, as that no prudent man would "have so acted. But no such issue was raised by the defendants." In the Exchequer Chamber counsel for the appellants only sought to distinguish *Clayards'* case[11] on the ground that there the acts of the defendants were wilful acts. Plaintiffs' counsel was not called upon and the judgment of the Queen's Bench was unanimously affirmed without comment on this matter.

The conclusion to be drawn from these cases appears to me to be that there is no magic in giving a warning. If the plaintiff knew the danger, either because he was warned or from his own knowledge and observation, the question is whether the danger was such that in the circumstances no sensible man would have incurred it or, in other words, whether the plaintiff's exposing himself to the danger was a want of common or ordinary prudence on his part. If it was not, then the fact that he voluntarily or knowingly incurred the danger does not entitle the defendant to escape from liability.

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[7] (1860) 2 B. & S. 106, 114–115.
[8] 12 Q.B. 439.
[9] 2 B. & S. 106.
[10] Ibid. 118.
[11] 12 Q.B. 439.

The only cases brought to our notice which are inconsistent with what I have said are *Malone* v. *Laskey* [12] and *Ball* v. *London County Council*.[13] In *Malone's* case [14] a contractor had put up a water tank insecurely and it fell on the caretaker's wife and injured her. *Heaven* v. *Pender* [15] was cited but not *Clayards* v. *Dethick*.[16] The case so far as relating to negligence was decided against the plaintiff on the simple but, in my view, erroneous ground that, as the contractor was not the occupier and there was no contractual relationship between him and the plaintiff, he owed no duty of care to her. In *Ball's* case [17] *Malone* [18] was followed as being binding on the Court of Appeal, and it is to be noted that there were other grounds which might also have been fatal to the plaintiff's case.

The whole matter was considered by the Second Division of the Court of Session in *Mooney* v. *Lanarkshire County Council*.[19] The tenant entered into occupation of a local authority's house before the making of the front path had been completed. A visitor to the tenant coming in at night tripped over a metal obstruction protruding from the path and was injured. She was held entitled to damages from the local authority, who were completing the path and had left the obstruction unprotected and unlighted. She was not their licensee because they were no longer the occupiers of the path. *Malone's* case [20] was not followed. The Lord Justice-Clerk (Lord Thomson) said [21]: "As "the defenders, on this hypothesis, did not have possession and "control in the accepted sense, it seems to me to be inappropriate "to try to equiparate their position to that of an owner or occupier "having such possession and control. I refuse to countenance "the idea that contractors employed to carry out a job on some-"body else's premises are entitled to say that their liability to a "person injured is to be measured in terms of the relationship "between the person injured and their employer." Lord Patrick said [22]: "If two parties are invited—and I use the word "in no technical sense—to resort to premises for different pur-"poses, and if it would be obvious to a reasonable man that the

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[12] [1907] 2 Q.B. 141; 23 T.L.R. 399.

[13] [1949] 2 Q.B. 159; 65 T.L.R. 533; [1949] 1 All E.R. 1056.

[14] [1907] 2 Q.B. 141.

[15] (1883) 11 Q.B.D. 503.

[16] 12 Q.B. 439.

[17] [1949] 2 Q.B. 159.

[18] [1907] 2 Q.B. 141.

[19] 1954 S.C. 245.

[20] [1907] 2 Q.B. 141.

[21] 1954 S.C. 245, 251.

[22] Ibid. 265.

" authorized operations of the one may endanger the other in his " permitted activities unless they are conducted with reasonable " care, a duty is owed by the one to the other to take such reasonable care . . . To such situations the limited duty owed by a " person in control and possession of heritage to licensees whom " he permits to come on his premises has no application. In my " opinion, the only decision which is consonant with the law of " reparation, as developed, is that a party invited to do work on " a pathway on private ground, which pathway forms the access " to the house from the public street, and which he must know " will be used by day and by night by the tenant and his invitees " and licensees, owes a duty to all these persons to do his work " with reasonable care so that their passage may not be rendered " perilous. If he erects a dangerous obstruction in the way, it " must be made apparent, so that they, using due care for their " own safety, may avoid the danger." In that case warning or lighting would have been sufficient to enable visitors to have access to the house without danger and the court did not have to consider a case like the present where the obstruction was such that safe access had been totally prevented. In my judgment, *Malone's* case [23] ought to be overruled in so far as it dealt with negligence.

I will at this point deal with two matters which have been referred to in argument but which received little attention at the trial. In the first place, there was a back door of the house No. 25, Cambray, and if that had been shown to be a reasonably practicable alternative access it would have been open to the appellants now to say that the respondent should have gone out that way and so avoided the danger of the route she took. But we know nothing about the back door except that it was locked at 5 p.m.; we do not know who locked it or who kept the key or whether the Privetts were allowed to use it after 5 p.m. No doubt this point was missed at the trial because the only defence then was that a safe access had been provided to the front door. Hallett J. said: " I think it would have been quite unreasonable " to have expected these various people to have used it on this " occasion," and: " She could have asked for the back door to " have been opened, although I think it was hardly negligent of " her not to." In my opinion, we must now disregard entirely the back door and take it that, when the respondent was invited to come in, her only alternatives were to come in as she did or to

[23] [1907] 2 K.B. 141.

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go away; and that, when she had come in, her only alternatives were to go out by the route she took or to stay the night where she was. The second matter is the plank laid down by Mr. Brown. The respondent's evidence suggests that she may have slipped off the plank either because it was slippery or because it moved. But no such case was made at the trial. Hallett J. asked Mr. Brown whether it would not have been safer if the plank had not been there. Mr. Brown said he did not think so and the matter was left there. I am therefore of opinion that we must take the case on the footing that in so far as the danger of the route caused the respondent's accident, that danger was the same as it was when the appellants' workmen were there in the afternoon.

I think that the first question to ask is whether the respondent acted reasonably in accepting Mrs. Privett's invitation and taking her advice to go the way she did. That must depend on whether the knowledge of the route which she then had ought to have made it clear to her that she would incur a degree of risk which a reasonable person in her position would not have incurred—in other words, whether a reasonable person with her knowledge would have declined the invitation and gone home. There was no urgency about her visit, she only happened to be passing when she was invited to come in. The reason why I first consider whether she acted reasonably in going in is that if she was unreasonable in going in she cannot found on there being some urgency to get out again so as to entitle her then to incur some greater degree of risk. I agree with Hallett J. that the question is not whether she realized the danger but whether the facts which she knew would have caused a reasonable person in her position to realize the danger. But in considering what a reasonable person would realize or would do in a particular situation we must have regard to human nature as we know it, and, if one thinks that in a particular situation the great majority of people would have behaved in one way, it would not be right to say that a reasonable man would or should have behaved in a different way. A "reasonable man" does not mean a paragon of circumspection.

cf (3)
No 2

The respondent was a very frequent visitor to No. 25. She knew the sunk area of No. 26 well and knew that it was unfenced—she said so in evidence. She must also have had at least a general idea of the rest of the route she proposed to take, but people differ very much in the degree to which they observe and remember things they pass every day. When describing her inward journey she said: "I could not get through the bushes "until I came up to the last bush . . . I saw I could get up "through the last bush, and I got up through there," which rather suggests that she did not have a clear picture of the route until she traversed it. Hallett J. says that "the whole of the "facts which constituted the danger were perfectly well known to "her when she was coming out." I agree, but I do not think that they were when she decided to go in. It was unnecessary, on his view of the law, for him to consider what she knew before she went in and I do not read his finding as covering this. Indeed, I do not think that the evidence would support such a finding about her knowledge at that stage.

In my judgment, it was not unreasonable for her to accept Mrs. Privett's invitation and follow her directions. She would think, and rightly, that Mrs. Privett knew much more about the route than she did. It is true that the respondent was 71 years of age, but she seems to have found no great difficulty in getting up a step from the ground to the top of the ramp which other witnesses say was two or three feet high. I think it would have been unreasonable for her to attempt this unknown journey in the dark without Mrs. Privett's invitation and direction, and if the appellants could disclaim all responsibility for Mrs. Privett's direction to the respondent, then it would be another question. But they cannot do that. Hallett J. found that their workmen advised the use of the route in question, and I can find no ground for supposing that that advice was confined to Mrs. Privett personally. They must have known that others might wish to come in and ought to have realized that this advice would be passed on to them. Certainly they gave no warning that no one else should go that way. If they had given a warning instead of an encouragement to Mrs. Privett, we do not know what would have happened. Perhaps she would have insisted that they should lay a plank walk over the rubble path.

The next question is whether, if she acted reasonably in going in, the fuller knowledge of the route which she gained on the inward journey made it unreasonable for her to try to go out the same way. Now, there was some urgency about making the return journey, for otherwise she would not get home. Here it is relevant to consider the attitude of the other people in the house when she left, Mrs. Privett, her son, and Mr. and Mrs. Brown. They all knew the route. Mrs. Privett's son offered to accompany the respondent but she said she could manage. It did not occur to any of them that she should not go or that she should not go alone. I find it very difficult to assume that they were all unreasonable people in letting her go alone, and I think that only a minute proportion of ordinary people put in the respondent's shoes and faced with the choice of staying the night or taking the route she did, would have chosen to stay the night. But I think that most people would have been more careful than she was. She would certainly have been wiser to take the son's offer, and I agree with the finding that there was contributory negligence on her part in not taking enough care when she left the house, but I cannot find that in seeking to return by this route she acted unreasonably or so negligently as to lead to the conclusion that her accident was caused entirely by her own fault.

It is sometimes said that when a visitor goes on, knowing the risk, the test is whether he was free to choose or acted under some constraint. My difficulty about that test is that freedom is a word which has come to have very different meanings for different people. If this test leads to the same answer as the question whether, in all the circumstances, the visitor acted reasonably, well and good. But if not, I think that, in cases like the present, reasonableness is the better test and is more in accordance with principle. The defendant is bound to take reasonable care, but he is entitled to expect that a visitor will behave in a reasonable manner. I leave aside cases where children are concerned.

In my view, the accident was caused partly by the danger of the route and partly by the respondent's own negligence. But the appellants argue that they cannot be held responsible for the danger of the route because they had no right to remove that danger or even to enter the grounds of No. 26 where the danger lay. It is true that they could not remove that danger: their fault lay in making it necessary for visitors to use that route. Their duty was to take reasonable care for the safety of visitors. They interfered with the existing safe access, as they had a right to do. But, in my opinion, their duty to visitors required them to mitigate the result of their interference in so far as, in all the circumstances, it was reasonable that they should do so, and I think that their own defence in this case shows that it would have been reasonable when they left off work to lay down a plank walk over the rough rubble path. But, even if I am wrong in that, I think that they were still at fault. I leave aside the point that they made this route possible by removing the railing at the top of the ramp, because that point was not dealt with at the trial and some explanation might have emerged if it had been. But they should have given warning against use of this route instead of advising its use, and, if they had done so, it is by no means improbable that matters would have developed in such a way that the respondent would never have taken this route. I am therefore of opinion that, in so far as the danger of the route contributed to cause the accident, the appellants are liable to the respondent. I see no reason to disagree with the decision of the majority of the Court of Appeal that the appellants and the respondent were equally to blame, and I am therefore of opinion that this appeal should be dismissed with costs to the respondent.

Lord Cohen. My Lords, I have had the opportunity of reading in print the speeches, one of which has been delivered by my noble and learned friend, Lord Reid, and the other of which is about to be delivered by my noble and learned friend, Lord Somervell. I agree so fully with the reasons they give for thinking that the appeal should be dismissed that I can state quite shortly my reasons for arriving at the same conclusion.

I need not recapitulate the facts. They have been fully stated by Denning L.J. in the Court of Appeal and by my noble and learned friend, Lord Reid.

So far as the law applicable to those facts is concerned Mr. Fox-Andrews did not dispute the principle which was stated by Denning L.J. as follows [24]: A contractor doing work on premises "is under a duty . . . to use reasonable care to prevent "damage to persons whom he may reasonably expect to be "affected by his work." Nor did Mr. Fox-Andrews deny that the respondent was such a person. But he argued that: (1) The dangerous condition which caused the accident to the respondent existed, not on the premises on which the appellants had been working, but on the adjoining premises and had not been created by the appellants. Moreover, the appellants had no control over the adjoining premises. Accordingly, the appellants were not responsible for any damage arising from this dangerous condition. (2) The duty resting on the contractor was confined to a duty to warn against any danger they had created, and, therefore, (3) though it is admitted that the appellants gave no warning, as the respondent knew all the relevant facts, the breach of duty cannot be said to have caused the accident.

My Lords, the short answer to the first of these submissions is, in my opinion, that the evidence does not lay the necessary foundation of fact for it. The learned judge described the state of the ground when the appellants' workmen ceased work on the day of the accident and said that there existed theoretically four means of approach to the front door of No. 25, Cambray, the premises on which the contractors were working. Three of them were situate entirely on these premises and the learned judge found that none of them was practicable. The fourth started over the forecourt of the adjoining premises, No. 26, Cambray, but ultimately crossed on to the ramp approach of No. 25 close to the top of the ramp. This undoubtedly involved passing close to the unfenced basement area of No. 26 and it is true that the appellants had no legal right either to fence it or place warning lamps around it. But this is, in my opinion, irrelevant, for, had not the appellants pulled down the fence which was on the same side of the ramp as No. 26 before they commenced work and put nothing in its place, this means of approach would never have existed at all. In these circumstances, I do not think the appellants can be heard to say that they did not create the danger which caused the accident to the respondent. I would add that the evidence of the respondent, read in the light of the plan which was before your Lordships, indicates that she commenced to fall while still on the premises of No. 25, and though the consequences of her fall might have been far less serious had there been no basement area in No. 26, the fall seems to have been caused by the state of affairs created by the appellants on the premises of No. 25.

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[24] [1957] 1 Q.B. 46, 57; [1956] 3 All E.R. 357.

Turning to the second of Mr. Fox-Andrews' submissions, I do not think that it is true to say that in all cases the only duty imposed on contractors is a duty to warn. Mr. Fox-Andrews relied on a series of cases where it was held that the liability of an occupier to his licensee was confined to a duty to warn, but I agree with Denning L.J. that the principle of these cases is not applicable when the relationship between the parties is not that of licensor and licensee but the claim is one for breach of a duty of care. In such a case, I think, the measure of liability is correctly stated by Denning L.J. where he says [25]: "The defen-"dants are liable, not because they are occupiers, but because "they created a dangerous state of things and they are under a "duty to use reasonable care to prevent damage from it. . . . "(They might in some circumstances fulfil their duty of care "to visitors by putting up a warning in clear terms: 'Danger. "'Keep Out': for that might suffice to prevent damage to them. "The occupants of the house might then have grounds of

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[25] [1957] 1 Q.B. 46, 57–58.

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"complaint for blocking their access, but the visitors would not.) "But if the contractors do provide an alternative route, on or "off No. 25, or adopt an alternative route, or point one out, as "they did here, or it is an obvious deviation for a visitor to take, "they are under a duty to use reasonable care to prevent damage "to visitors who take that route. A contractor who creates a "dangerous state of things cannot escape the consequences by "leading people into another danger."

Denning L.J. also said[26]: "It is true that they are under "no duty to visitors to provide an alternative route for getting "to the front door." My Lords, I incline to think that this statement is too widely expressed. Take the hypothetical case suggested in the course of the argument by one of your Lordships of a doctor called in to a patient seriously ill. If the contractor knew that the house contained a patient seriously ill, I doubt whether he would fulfil his duty merely by warning the doctor of the danger the contractor had created. It might well be that he must create an alternative route. Even on the facts of the present case I doubt whether the contractor could have discharged his duty without putting an obstruction in the place of the railing he had removed similar to that which he erected on the opposite side of the ramp to prevent a fall into the basement area of No. 25. It is not, however, necessary to decide this point, since even if a warning was enough, no warning was in fact given.

This brings me to the third submission based on the respondent's alleged knowledge of all material facts. On this point I agree with Denning L.J. that knowledge of a plaintiff of the danger can only excuse the defendant where the tribunal, which is the judge of fact, finds on proper evidence that the injury suffered by the plaintiff can be said to be due solely to his own fault. Before the passing of the Contributory Negligence Act, 1945, mere contributory negligence of the plaintiff would have afforded a defence to the defendant, but under the present law, as Denning L.J. said in *Slater* v. *Clay Cross Co. Ltd.*,[27] it is not a bar to the action but only a ground for reducing the damages.

It was argued that the learned judge had found as a fact that the accident was due solely to the fault of the respondent. It is true that in one passage he said: "The whole of the facts which "constituted the danger were perfectly well known to her when "she was coming out," but in the penultimate paragraph of his judgment he said that "she herself contributed very largely "indeed to her accident." The second passage seems to me to come nearer to representing the effect of the evidence which was before the court. I agree with Denning L.J. that the respondent did not fully appreciate the danger of the "fourth route." She admitted that she was a frequent visitor to No. 25, that she had seen the area of No. 26, and that she knew there was no fencing around it, but on the occasion of her previous visits the two premises were separated by a railing, and I see no reason to suppose that she had ever directed her mind to the question of the distance between the basement area of No. 26 and the bushes between the two properties. Indeed, she herself said she did not know how far the plank from which she fell was from that basement area. The trial judge relied upon the knowledge he attributed to her as the result of her entrance to the house by the fourth route. But she entered after it was dark, and I see no reason to suppose her entry enlarged her knowledge. Indeed, the fact that she had got in safely by that route would, I should have thought, have made her more inclined to think she could safely use the fourth route, especially bearing in mind that the appellants' servants had recommended this route to the occupier of No. 25 and she had passed this advice on to the respondent. On the question of the measure of the contributory negligence of the respondent I cannot usefully add anything to what was said by my noble and learned friend, Lord Reid.

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[26] [1957] 1 Q.B. 46, 57–58.

[27] [1956] 2 Q.B. 264, 271; [1956] 2 All E.R. 625.

For these reasons I agree with the majority of the Court of Appeal that the accident cannot be attributed solely to the respondent's conduct and that the conduct only affords a reason for reducing the damages.

I would dismiss the appeal.

LORD KEITH OF AVONHOLM. My Lords, I do not see this case so clearly as some of your Lordships. To begin with, the facts of the case and particularly the nature of the approach on to the ramp at or near the front door of No. 25 are not so clearly brought out in the evidence as to make me fully confident that we can draw the correct inference as to how the plaintiff met with her accident. I should have liked to know more about the terrain between the boundary of Nos. 25 and 26 and the side of the ramp of which at least one half, from the door of No. 25 towards the street extending to some 27 feet, was still in being at the time of the accident. It is quite impossible, in my opinion, to accept the evidence of the plaintiff, a woman 71 years of age, that she stepped up three feet to get on to the ramp. Three feet is a climb not a step. Having said so much, however, I think it is a fair inference to draw from the evidence that on leaving No. 25 the plaintiff fell as she stepped off the side of the ramp on to the plank that had been placed below the ramp by Mr. Brown and that the accident started at least on the property of No. 25, though how the plaintiff covered the six to eight feet or so intervening between the place of her fall and the area of No. 26 remains one of the unexplained features of this case.

Turning now to what are matters of law, I agree that the contractors had a duty to protect members of the public or occupants of No. 25, seeking to enter or leave the house, from harm as a result of their operations. The extent of that duty must, in my opinion, depend, however, on what a reasonable man might contemplate as likely to happen on the property of No. 25 from the state in which it was left. I emphasise the words "on the property" for I am quite unable to accept the view that if the accident had begun and ended on the property of No. 26, the contractors would have been liable. I say so for various reasons. In the first place, the plaintiff knew as much, indeed more, about No. 26 than did the contractors or their men. The men had been working at No. 25 only two days before the accident happened. The plaintiff had been a frequent visitor at No. 25—two or three times a week, she says, for a period of about one year. She knew all about the layout of No. 26 and its unprotected basement area. But that is not the chief point. Technically the plaintiff was a trespasser on No. 26. The trespass was insignificant and certainly excusable. But I cannot see how the contractors' men, assuming they advised or encouraged the trespass, are in any different position from the plaintiff. If a person encourages a trespass and another person accepts the encouragement, both being aware of the position, and the actual trespasser is injured by some danger on the land trespassed on, known to both, there is no principle I know of which would attach liability to the instigator or encourager in a question with the trespasser who accepts, I think, the risk attached to the route. Deception of, or ignorance of, or inadvertence of, the trespasser might raise difficult questions in certain circumstances or certain dangers, but nothing of that sort is present in this case. So viewing the matter, I find myself unable to agree with a passage in the judgment of Denning L.J., as he then was, where he says[28]: "But if the contractors do provide an alternative route, on or off No. 25, or adopt an alternative route, "or point one out, as they did here, or it is an obvious deviation "for a visitor to take, they are under a duty to use reasonable "care to prevent damage to visitors who take that route. A "contractor who creates a dangerous state of things cannot escape "the consequences by leading people into another danger."

No case was cited and I know of none where a contractor has been held liable for a danger not of his own creation and existing on adjacent property with which he had nothing to do and with which he had no right to interfere. I could go no further than to say that if, in circumstances like the present, a contractor does not provide a reasonably safe approach to the house, he may be liable to a person seeking to enter or leave the house who takes the risk of passing over or on the danger left by the contractor and sustains injury thereby. No case was cited and I know of none that would carry the contractor's liability further than this and, in my opinion, the ratio of none of the cases cited can be stretched to cover a peril on adjacent land for which the contractor was in no way responsible.

I think, however, it is possible to hold that as a result of operations conducted by the contractors here, the plaintiff was precipitated from the property of No. 25 into the danger on the adjacent property of No. 26 owing to the dangerous condition of the access to the door of No. 25 created by the contractors, and it is not, I think, a relevant factor that the plaintiff was intending to trespass on adjacent property. What is material is that the evidence shows that persons were using this route or approach to No. 25, that the contractors' men knew that Mrs. Privett, the caretaker's wife, was using this route, and should have contemplated that other persons might use the same route. The contractors had removed the railings alongside the ramp and so made this route possible and they had provided no safe alternative route. I think, therefore, they were liable for the accident that happened.

I would dismiss the appeal.

Lord Somervell of Harrow. My Lords, I agree with the majority of the Court of Appeal that a person executing works on premises, as were the first defendants in this case, is under a general duty to use reasonable care for the safety of those whom he knows or ought reasonably to know may be affected by or lawfully in the vicinity of his work. Some of the phrases in the above statement are taken from the judgment of Denning L.J. in this case and some from that of Scrutton L.J. in *Kimber* v. *Gas Light and Coke Co.*[29] I also agree with Scrutton L.J. that this is laid down plainly in *Corby* v. *Hill.*[30] More recently the principle was applied in *Haseldine* v. *C. A. Daw & Son Ltd.*[31]

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[28] [1957] 1 Q.B. 46, 58.

I also agree with Denning L.J. that *Malone* v. *Laskey*[32] was wrongly decided in so far as it held that the repairers of a water tank owed no duty to the plaintiff to take reasonable care to prevent danger because there was no contract between them and the plaintiff, the plaintiff being a resident on the premises. If and in so far as *Ball* v. *London County Council*[33] was based on the decision in *Malone* v. *Laskey*[34] it cannot be regarded as an authority.

The duty being a general duty to use reasonable care, reasonableness is the test of the steps to be taken. In the present case the learned judge held that the defendants were not under a duty *in law* (my italics) to provide an alternative means of access. Denning L.J. said that the defendants were under no duty to provide an alternative route. With respect, I think this is the wrong approach. Their duty is to do what is reasonable. There may well be cases where it is reasonable to leave the normal route dangerous and to provide a safe alternative. There may be other cases where it is reasonable to make the old route safe by planks or covering or fencing-off of holes or other appropriate steps. There may be other cases where it is reasonable to make entrance from the front impossible and make everyone go round to the back door. I am only stressing the fact that reasonableness is the test.

Here the learned trial judge thought the defendants ought to have done that which they said they had done, namely, have left a plank walk fenced with ropes and stakes. He held, however, they were under no duty in law so to do. As it was their case that this had been done, it would seem reasonable to hold that it would have been a reasonable step to have taken knowing that there would probably be visitors. I agree with the majority of the Court of Appeal that the defendants were negligent in leaving the premises as they did and in "advising" the route which led round the laurel bush without either fencing or putting lights by the open area of No. 26.

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[29] [1918] 1 K.B. 439, 447; 34 T.L.R. 260.

[30] (1858) 4 C.B.N.S. 556, 557.

[31] [1941] 2 K.B. 343; 58 T.L.R. 1; [1941] 3 All E.R. 156.

[32] [1907] 2 K.B. 141.

[33] [1949] 2 K.B. 159.

[34] [1907] 2 K.B. 141.

The fact that this route was indicated by the defendants' servants seems to me to remove the suggested difficulty as to the danger being on neighbouring land. If the defendants felt unable to put up lights or protection on the land of No. 26, that would be a reason for making a safe route on No. 25 or taking reasonable steps to ensure that everyone used the back door.

Did the defendants' negligence cause the accident? Their negligence caused the use of the No. 26 route by the plaintiff. That route was described by the learned judge as follows: "The "fourth and the only other route was to advance by the fore-"court"—that is of No. 26—"until you were almost in the "basement . . . You then round the laurel bush in the small "space in between, dipping or bobbing down or having your face "hit by the branches, and then climbing up on to the ramp "which you would meet not quite at its top but a few paces "down from its top where, as far as I can tell from the evidence, "the height would be about three feet."

If, as I have held, the taking of this route was the consequence of the defendants' negligence, prima facie a fall into the unfenced basement in the dark would be a consequence of that negligence. But it is said the plaintiff knew of the danger. Before the Contributory Negligence Act, 1945, a plaintiff guilty of contributory negligence could not recover, although the damage was in part due to the negligence of the defendant. The plaintiff's knowledge of a danger was relevant to the question whether he had been guilty of negligence which contributed to the accident. There is often, as there was in *Clayards* v. *Dethick*,[35] a further question as to whether, although knowing of the danger, he acted reasonably, in all the circumstances, in taking the risk which he did take. If so, he was not negligent although there was an accident. Since the Contributory Negligence Act the question is whether, having regard to his knowledge and the other circumstances, the plaintiff was negligent and, if so, was his negligence the sole cause of the accident or only a contributory cause? The appellants relied on the finding by the learned judge that the plaintiff at all material times knew that the basement was unfenced and the physical facts of the general layout. It would, of course, have been absurd to suggest that she knew, at any rate before her first journey up the route, what was the exact proximity of the basement when she was pushing round the laurel bush in the manner described by the learned judge. Nor was it put to her in cross-examination that she had any such precise knowledge after reaching the house. The learned judge has found that there was no appreciable light from the street lamps and she may well have thought the distance greater than it was. When she left she did not want to trouble anyone to assist her. This may have been negligent. There may have been negligence in the actual way she tried to make her way round the bush. For my own part, the contribution of her own negligence to the accident certainly did not exceed the 50 per cent. attributed to her.

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[35] 12 Q.B. 439.

Denning L.J., in his judgment, cited and applied a statement of his own in *Slater* v. *Clay Cross Co. Ltd.*[36]: "Knowledge of the "danger is only a bar where the party is free to act on it, so that "the injury can be said to be due solely to his own fault . . . "Where knowledge of the danger is not such as to render the "accident solely the fault of the injured party, then it is not a "bar to the action but only a ground for reducing the damages."

I think the words "free to act" in the context may be ambiguous. The plaintiff was "free" to stay the night in No. 25 but the learned judge did not mean that her freedom to do this meant that the accident was due solely to her own fault. There may be many cases where a plaintiff is "free" in one sense to avoid the risk altogether but where it would be reasonable to run the risk. When the plaintiff has full or partial knowledge of the danger the question must always be: Was the injury, in all the circumstances, including the plaintiff's knowledge, due solely to his own negligence or was it due solely to the negligence of the defendant or was it due to the negligence of each?

For the above reasons, which are substantially those given by Denning L.J., I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Gibson & Weldon for Keith Scott & Co., Gloucester; Syrett & Sons for Ivens, Thompson & Green, Cheltenham.*

F. C.

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[36] [1956] 2 Q.B. 264, 271.

[HOUSE OF LORDS.]

COUNTESS OF KENMARE . . . . APPELLANT; H. L. (E.)*

AND 1957

INLAND REVENUE COMMISSIONERS . RESPONDENTS. July 1, 2, 3, 25

Revenue—Income tax—Settlement—Revocability—Residence of settlor out of the jurisdiction—Property within the jurisdiction—Income from settlement included in settlor's assessment for surtax—Power from time to time to determine part of trusts—Equivalent to a power to revoke—Settlor out of the jurisdiction included—Finance Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 46), *s.* 38 (2), *Sch. III, Part I.*

A settlement, governed by the law of Bermuda, of property to the value of some £700,000 was made in 1947 by a settlor at all material times resident in Bermuda, where the trustees were also resident. The settled property was situated in the jurisdiction. The settlement contained, in clause 3, trusts after the death of the settlor in favour of issue, and clause 5 (a) provided: "Notwithstanding the trusts hereinbefore declared the trustees if "they in their absolute discretion think fit may at any time and "from time to time during the lifetime of the settlor . . . declare "that any part of the trust fund not exceeding [in any one period "of three consecutive years the sum of £60,000] . . . shall thenceforth be held in trust for the settlor absolutely and thereupon the "trusts hereinbefore declared concerning the part of the trust fund ". . . to which such declaration relates shall forthwith determine "and the trustees shall thereupon transfer such part of the trust "fund . . . to which such declaration relates to the settlor absolutely . . ." The settlor was assessed to surtax under section 38 (2) of the Finance Act, 1938, in respect of her income under the settlement.

By that subsection: "If . . . the terms of any settlement are "such that—(*a*) any person has or may have power, whether "immediately or in the future . . . to revoke or otherwise determine the settlement or any provision thereof; and (*b*) in the "event of the exercise of the power, the settlor . . . will or may "become beneficially entitled to the whole or any part of the "property . . . comprised in the settlement . . . any income arising "under the settlement . . . shall be treated as the income of the "settlor for that year . . .":—

Held, (1) that any settlement wherever made, and whatever foreign element might be imported by the residence of the settlor or the trustees or the forum of administration, might be caught by the provisions of the subsection if the income arose in the United Kingdom; (2) that the powers given to the trustees by clause 5

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD COHEN, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

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might enable them by successive withdrawals to exhaust the trust fund in the settlor's lifetime and thus determine the settlement and that, accordingly, the assessment was rightly made.

Astor v. *Perry* [1935] A.C. 398; 51 T.L.R. 325 distinguished.

Decision of the Court of Appeal (sub nom. *Inland Revenue Commissioners* v. *Kenmare*) [1956] Ch. 483; [1956] 3 All E.R. 69 affirmed.

APPEAL from the Court of Appeal (Singleton, Morris and Romer L.JJ.)

This was an appeal from an order of the Court of Appeal dated July 2, 1956, dismissing an appeal by the appellant, Enid, Countess of Kenmare, from an order of Danckwerts J. dated May 12, 1955, whereby an appeal by the respondents, the Commissioners of Inland Revenue, on a case stated for the opinion of the High Court by the Commissioners for the Special Purposes of the Income Tax Acts, was allowed and their determination was reversed. The Special Commissioners had allowed the appellant's appeal against an assessment to surtax.

The facts, stated by Viscount Simonds and Lord Reid, were as follows: In August, 1947, the appellant ceased to reside in the United Kingdom, and on September 24, 1947, she made a settlement in Bermuda, according to the law of that island. The property comprised in the settlement consisted of certain mortgages and certain stocks, shares and securities in industrial companies in the United Kingdom of the value of about £700,000. The trustees of the settlement were Nicholas Conyers Dill and the Bank of N. T. Butterfield & Son Ltd., both of them resident in Bermuda.

The relevant provisions of the settlement were:

"2. (a) The trustees shall in their absolute discretion pay "the income (or such part thereof in their absolute discretion as "aforesaid) of the scheduled investments and of the property "for the time being representing the same (hereinafter called "'the trust fund') to the settlor during her life. (b) The trustees "shall hold all such income as shall not be paid as aforesaid on "income account and shall in their absolute discretion pay the "whole or any part of such balance from time to time to the "settlor during her life provided always that any such balance "at the date of the death of the settlor shall be added to the "trust fund and shall devolve accordingly."

Clause 3 provided that after the death of the settlor the trustees should stand possessed of the capital on the trusts for the benefit of the children or remoter issue of the settlor which are usually found in such a settlement.

"5. (a) Notwithstanding the trusts hereinbefore declared the "trustees if they in their absolute discretion think fit may at any "time and from time to time during the lifetime of the settlor "by writing under their hands declare that any part of the trust "fund not exceeding the amount hereinafter mentioned shall "thenceforth be held in trust for the settlor absolutely and thereupon the trusts hereinbefore declared concerning the part of "the trust fund or the property to which such declaration relates "shall forthwith determine and the trustees shall thereupon "transfer such part of the trust fund or the property to which "such declaration relates to the settlor absolutely provided "always that the foregoing power shall not be exercisable by "the trustees so as to vest in the settlor in any period of three "years the first of which shall commence on the date hereof "and end on the same date in the year 1950 the second of which "shall end on the same date in the year 1953 and so on in every "third year a part or parts of the trust fund or property of a "value or aggregate value exceeding £60,000 of the currency of "the Islands of Bermuda. (b) If in any such period of three "years the foregoing powers shall not be exercised to the full "extent of the said sum of £60,000 the deficiency may be carried "forward so as to increase the amount in respect of which the "said power may be exercised in any succeeding period of three "years. (c) For the purposes of this clause the value of a part "of the trust fund or property declared to be held in trust for "the settlor absolutely shall be the value thereof at the date of "such declaration and the trustees may ascertain and fix such "value in any manner they may think fit and their decision shall "bind all parties claiming hereunder."

The whole income arising from the trust fund for the period from September 24, 1947, to April 5, 1948, which amounted, before deduction of United Kingdom tax and expenses, to £24,127 6s. 7d., was put at the disposal of the appellant or paid to her by the trustees, and this sum was included in the assessment of the appellant to surtax for the year 1947–48 upon the footing that it was caught by section 38 (2) of the Finance Act, 1938.

F. Heyworth Talbot Q.C., *F. N. Bucher Q.C.* and *Hubert Monroe* for the appellant. Two questions arise: (1) whether there is power to revoke or otherwise determine the settlement or any provision thereof, and (2) whether section 38 (2) can, in any event, apply where the settlor and the trustees are not resident in the United Kingdom and the settlement is a foreign settlement.

As to the first question, the powers of the trustees under the provisions of clause 5 (a) do not amount to a power, present or prospective, "to revoke or otherwise determine the settlement," and therefore section 38 (2) does not apply. Even if clause 5 enabled the trustees to pay or transfer the whole of the trust fund to the appellant, so as to produce eventually the exhaustion of the settled fund, that does not mean that the provision itself can be described as a power to determine the settlement. That would merely be an execution of the trusts of the settlement itself. If it should happen that the settled fund is exhausted in the future, that result will be attributable, not solely to the nature of the power, but largely to events and surrounding circumstances such as the duration of the appellant's life or the appreciation or depreciation of the investments—matters outside the terms of the settlement. One might have a case in which income was given to a beneficiary but the trustees were given power out of capital to make up the income (if necessary) to a fixed amount. No one in the normal use of language would describe such a power as a power to revoke or determine the settlement. Nevertheless the exercise of such a power might result ultimately in the exhaustion of the settled fund. The chance of that might be extremely remote, yet the decision of the Court of Appeal now appealed from would lead to the conclusion that such a power was a power to revoke or determine the settlement. It is hard to believe that Parliament could have intended so extraordinary a result.

This is not the sort of power aimed at by section 38 (2), the draftsman of which was directing himself to the case of a settlor having power to take back what he has given. But this is a case where extraneous circumstances may spring up which may have the effect of exhausting the fund, though the nature of the power remains unchanged. The power exists under clause 5 (a) and its present exercise will not exhaust the funds, nor can it be predicated that a time will ever come when, by an exercise of the power, the trustees will be able to remove all the remaining capital from the trust.

On this part of the case, see *Wolfson* v. *Inland Revenue Commissioners*,[1] *Inland Revenue Commissioners* v. *Wolfson*[2] and *Saunders* v. *Inland Revenue Commissioners*.[3]

Under the general principles of income tax law it is the person who gets the income who is liable to pay the tax on it.

Further, even assuming that, in the phrase "to revoke or "otherwise determine the settlement or any *provision* thereof," provision means the benefit provided, the "provision" for the appellant is not revoked or otherwise determined if part of the settled fund is paid to her, nor is the provision for the remainderman revoked or otherwise determined, since all that is provided for him is in effect what remains after the exercise of any discretion in the appellant's favour. But the "provision" in this context means the clause and not the benefit, and that obviously is not determined merely by diminishing the fund.

On the second question *Astor* v. *Perry*[4] is relied on. Section 38 (2) cannot be intended to apply to a foreign settlement, especially where the settlor has no effective way of recovering what he has paid to the trustees. Part I of Schedule III to the Act of 1938 provides machinery for giving effect to section 38, enabling a settlor, who has been compelled to pay tax under section 38, to recover what he has paid from the trustee or other person to whom income arises under the settlement. It also contains other provisions to which it would be hard to give effect where the settlor and trustees were out of the jurisdiction. If a settlor cannot effectively exercise those rights, he cannot be within the charging section. It would be unreasonable to hold that Parliament intended to make a foreign resident liable for tax on income from property which he had ceased to own. Section 38 (2) must be so construed as not to apply to cases where the settlor is outside the United Kingdom and the settlement is a foreign settlement. The fact that the income is derived from property in the United Kingdom is immaterial.

Camille and Henry Dreyfus Foundation Inc. v. *Inland Revenue Commissioners*[5] is relied on.

F. N. Bucher Q.C. following. *Whitney* v. *Inland Revenue Commissioners*[6] is not conclusive against the appellant in the circumstances of this case, and the income arising under the settlement in the fiscal year 1947–48 was, in the events which occurred, income to which the appellant (who was neither resident nor ordinarily resident in the United Kingdom at the material time) became actually entitled, but in respect of which she was not chargeable to income tax by reason of her not being so resident or ordinarily resident.

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[1] [1948] 1 All E.R. 725, 727; 31 T.C. 141, 160.

[2] (1949) 65 T.L.R. 260, 261; [1949] 1 All E.R. 865.

[3] [1956] Ch. 509; [1956] 3 All E.R. 83.

[4] [1935] A.C. 398; 51 T.L.R. 325.

[5] [1954] Ch. 672, 683, 687, 702–703; [1954] 2 All E.R. 466; (H.L.) [1956] A.C. 39, 46; [1955] 3 All E.R. 97.

[6] [1926] A.C. 37, 42–43, 52; 42 T.L.R. 58.

Section 41 (4) (*a*) was not aimed at a discretionary interest in income arising under a foreign trust. In that section the draftsman was dealing with the taxpayer's real income. It is to be presumed that he was not intending to tax income from a foreign source in the hands of a foreign resident. This was not " income " chargeable to income tax by deduction " within that paragraph. Section 38 does not apply to the settlement, the proper law of which is not the law of any part of the United Kingdom. The appellant's rights under that foreign settlement do not come within the definition of " income arising under a settlement " in section 41 (4) (*a*).

As to the question of revocation, the power of the trustees under clause 5 of the settlement does not amount to a power to revoke or otherwise determine the settlement or any provision thereof. Section 38 (1) and (2) is dealing with incomplete alienation and section 38 (3) with suspended alienation. Compare the wording of section 38 with that of section 20 of the Finance Act, 1922. Though the scope of section 38 is wider, the words describing the power of revocation are narrower. To " revoke " or otherwise determine the settlement " implies dealing with it as a whole. To " determine " means to bring something to an end and cannot involve leaving something behind. The power in this settlement is not of the kind dealt with in section 38.

Geoffrey Cross Q.C., *Sir Reginald Hills* and *E. B. Stamp* for the respondents. The appellant was rightly assessed to surtax in pursuance of section 38 (2) of the Act of 1938 in respect of the income arising under the settlement.

Under the settlement the trustees had or might have power, immediately or in the future, to revoke or otherwise determine the settlement or a provision thereof, and, if that power were exercised, the appellant would, or might, become beneficially entitled to all the property comprised in the settlement. The terms of clause 5 indicate the possibility of a partial revocation of the settlement.

Determining a provision within section 38 (2) must mean putting an end to some benefit, and the phrase " settlement or

" any provision thereof " does not merely describe the instrument whereby the trusts are declared but comprises the trusts declared and the rights and interests created. As to the meaning of the word " provision," see *Berkeley* v. *Berkeley*.[7] So determining a provision refers most naturally to the rights conferred. The power conferred by clause 5 may cover the whole property settled. Even if it were merely a power to take out £60,000, it would fall within the subsection quoad that sum, since a partial revocation is covered.

As to the point of extraterritoriality, the income in question was within section 41 (4) (*a*) as " income chargeable to income " tax by deduction " and therefore was income arising under the settlement within section 38 (2): see *Astor* v. *Perry*.[8] A settlement within section 38 (2) cannot be limited to a settlement taking effect under the law of the United Kingdom. To hold that it is not so limited is not a breach of international comity.

As to the machinery provisions in Part I of Schedule III to the Act of 1938 relied on by the appellant, it is not established that she could not effectively exercise the right of recovery thereby conferred on her. Even if it were so established, that would not constitute a reason for so construing section 38 as to exclude from its operation income arising under the settlement from property in the United Kingdom. If trustees invest the trust funds in the United Kingdom, the beneficiaries cannot complain if they are subject to the fiscal laws of the United Kingdom.

Sir Reginald Hills following. The object of a trust is to confer beneficial interests. A trust only comes within this legislation if the settlor has a right to obtain the beneficial interest, and when that is done it creates a new property interest and terminates the old interests. Here there is a clear provision that certain interests may be reduced and other interests substituted.

It is not possible to hold, on any considerations of hardship, that this section should not apply to foreigners, who understand nothing of English law. Anyone investing in American securities would inquire first what American tax law was. So people who invest in the United Kingdom expose themselves to United Kingdom tax law. Property in this country may be taxed even if the person interested is not here.

No limitation should be placed on the scope of words not meant to be limited. The mere fact that there may sometimes be difficulty in applying a tax law in an administrative sense is not a ground for limiting its scope.

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[7] [1946] A.C. 555, 580–581; 62 T.L.R. 478; [1946] 2 All E.R. 154.

[8] [1935] A.C. 398, 406, 409, 411, 416, 419–420; 51 T.L.R. 325.

F. Heyworth Talbot Q.C. in reply. Clause 5 is not designed as a power to put an end to the settlement. It is not in its real nature a power, present or future, to revoke the settlement or any provision of it. On a general view of section 38, Parliament cannot have thought it right to lay a charge of tax on a person in respect of income which he might never get without providing for recovery by him from the person whose income had been imputed to him. Unless there were that right of recourse the thing would be quite unjust in concept. As to irrevocability of a settlement, see section 21 (8) of the Finance Act, 1936.

Their Lordships took time for consideration.

VISCOUNT SIMONDS stated the facts and continued: My Lords, section 38 (2) is as follows: " If and so long as the terms of any " settlement are such that—(*a*) any person has or may have " power, whether immediately or in the future, and whether with " or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof; and " (*b*) in the event of the exercise of the power, the settlor or the " wife or husband of the settlor will or may become beneficially " entitled to the whole or any part of the property then comprised " in the settlement or of the income arising from the whole or " any part of the property so comprised; any income arising under " the settlement from the property comprised in the settlement " in any year of assessment or from a corresponding part of that " property, or a corresponding part of any such income, as the " case may be, shall be treated as the income of the settlor for " that year and not as the income of any other person: Provided " that, where any such power as aforesaid cannot be exercised " within six years from the time when any particular property " first becomes comprised in the settlement, this subsection shall " not apply to income arising under the settlement from that " property, or from property representing that property, so long " as the power cannot be exercised."

Reference must also be made to subsection (5) of the same section, which provides that the provisions of Part I of Schedule III to the Act shall have effect as respects the recovery by a settlor of tax with which he becomes chargeable and the recovery from a settlor of any additional relief to which he becomes entitled by virtue of that section, and to subsection (7), which provides that the provisions of that section shall apply for the purposes of assessment to income tax for the year 1937–38 and subsequent years and shall apply in relation to any settlement wherever made and whether made before or after the passing of the Act. I must also mention that by section 41 (4) the expression "income "arising under a settlement" is defined as including "any "income chargeable to income tax by deduction or otherwise, "and any income which would have been so chargeable if it had "been received in the United Kingdom by a person domiciled, "resident and ordinarily resident in the United Kingdom"; and the expression "settlement" is defined as including "any disposition, trust, covenant, agreement or arrangement," and the expression "settlor" in relation to a settlement as meaning "any person by whom the settlement was made." Finally, reference must be made to Part I of Schedule III to the Act, which provides, by paragraph 1: "Where by virtue of any "provision of section 38 of this Act any income tax becomes "chargeable on and is paid by a settlor, he shall be entitled— "(*a*) to recover from any trustee, or other person to whom income "arises under the settlement, the amount of the tax so paid; and "(*b*) for that purpose to require the Commissioners concerned to "furnish to him a certificate specifying the amount of income "in respect of which he has so paid tax and the amount of tax "so paid."

The appellant, submitting to the jurisdiction, appealed against this assessment to the Special Commissioners on two grounds which, stated shortly, were (*a*) that the settlement by reason of what I may call its foreign character was not a settlement to which upon its true construction section 38 applied, and (*b*) that the power conferred by clause 5 upon the trustees was not a power to revoke or determine the settlement or any provision thereof within the meaning of the section. The Special Commissioners upheld her appeal on the first ground, and therefore thought it unnecessary to express any view on the second. Upon appeal by way of case stated to the court, Danckwerts J. reversed the decision of the Special Commissioners, and his judgment was upheld by the Court of Appeal. Upon what I have called the first ground there was no difference of opinion between any of the learned judges, and there was, in my view, little room for any difference. The language of section 38, and particularly of subsection (7), and of section 41, makes it clear beyond all doubt that any settlement, wherever made and whatever foreign element might be imported by the residence of settlor or trustees or the forum of administration, is caught by its provisions if the income arises in the United Kingdom. It is conceivable that there might be other provisions of the Act which, read with section 38, would enforce a narrower meaning upon the word "settlement" where it occurs in section 38. In *Astor* v. *Perry*[1] this House by a majority was constrained as a matter of construction to limit the prima facie generality of certain words appearing in section 20 of the Finance Act, 1922, and the Special Commissioners were led or misled by this decision, and particularly by the opinion of Lord Macmillan, into imposing a similar limitation upon section 38. It cannot, however, be ignored that the Finance Act, 1938, was enacted after the decision in *Astor* v. *Perry*,[1] that its language appears to be designed precisely to overcome the difficulties to which that case had given rise and that the definition of income "arising under a settlement" excludes from the operation of the section the income arising from foreign investments to which Lord Macmillan had directed the very pertinent question relied on by counsel for the appellant. Special attention was properly directed to the so-called machinery provisions of Schedule III. But the difficulty which may or may not arise in applying them to the case of a settlement with foreign trustees —an event which may happen whether the settlor himself is or is not resident in the United Kingdom—falls far short of such a contradiction or inconsistency as must impel the court to limit the plain meaning of the substantive words of the section. Upon this part of the case I can add nothing to what has been said by the learned judges of the Court of Appeal, with whom I am in full agreement.

I turn to the second point. Is the power given to the trustees by clause 5 of the settlement a power within the meaning of section 38 (2) of the Act? In the courts below the conclusion has been unanimously reached that it is, but not always for the same reason. For the purpose of this appeal I think it necessary only to consider and, having considered, affirm the opinion of the Court of Appeal, that whatever may be the meaning of the word "provision" the power given to the trustees may enable them by successive withdrawals of the trust fund to exhaust it during the lifetime of the settlor and thus determine the settlement. This conclusion admittedly leaves unsolved certain difficulties of interpretation, but I think it better to reserve them for discussion in the following appeal of *Inland Revenue Commissioners* v. *Saunders*, where their solution is inescapable.

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[1] [1935] A.C. 398; 51 T.L.R. 325.

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I have already stated in full the relevant parts of section 38 (2). I would now only recall attention to the words "has or may "have," "immediately or in the future" and "revoke or other-"wise determine." Applying these words to the present case, I do not see how it can be denied that the trustees may in the future have power to determine the settlement. Successive withdrawals from the trust fund upon the permitted scale will within a measurable space of time leave nothing upon which the trusts of the settlement can operate; the settlement will then be determined. This event may be advanced by a depreciation of the trust fund or delayed by its appreciation. It may never take place by reason of the earlier death of the settlor. But I do not see how it can be said that the day may not arrive when, the appellant being still living, the trustees will have the power to withdraw the last pound of the trust fund and place it at her disposal. For all I know that is what may have been intended or at least hoped for.

For these reasons I am of opinion that this settlement was within section 38 (2) of the Act and that the assessment was rightly made. I would dismiss the appeal accordingly, with costs.

LORD REID stated the facts and continued: My Lords, clause 3 provides that after the death of the settlor the trustees shall hold the capital and any balance on income account in trust for the settlor's children.

The whole of the income arising from these investments for the period from September 24, 1947, to April 5, 1948, was put at the disposal of the appellant by the trustees. The appellant was assessed to surtax on the income, and the question in this case is whether that assessment was rightly made. It is admitted that this income did not belong to the appellant when it accrued and that the sum which she received came to her by virtue of her rights under the settlement. Accordingly, as she resided abroad and received the money by virtue of rights under a foreign settlement, she could not be assessed unless there are statutory provisions which cover this case. The respondents rely on section 38 (2) of the Finance Act, 1938, which is in these terms:

[His Lordship read the subsection and continued:] The appellant maintains that on their true construction the provisions of that subsection do not apply. Her case is put on two quite separate grounds. In the first place it was argued that the terms of this settlement are not such that the trustees "may have "power . . . in the future . . . to revoke or otherwise determine "the settlement or any provision thereof." If that submission is well founded then admittedly the assessment is invalid. If it is not well founded, then the appellant's second argument is that the subsection must be so construed as not to have any application to a case where the settlor is not resident in the United Kingdom and the settlement is a foreign settlement, and that the fact that the income is derived from property in the United Kingdom is immaterial.

Under clause 5 of the settlement the trustees were empowered in their absolute discretion to release £60,000 from the trusts of the settlement during the period of three years which ended on September 24, 1950, and they have been empowered and will be empowered to release a further sum of £60,000 in each succeeding triennium so long as the settlor survives. This power is cumulative so that, even if nothing has yet in fact been released and put at the absolute disposal of the settlor, there would now be power to release £240,000. The time must come, if the settlor survives long enough, when the trustees will have power to release the whole of the trust fund. We do not know when that time may come, because the value of the trust fund may alter. But, if the increase or decrease in value is not very substantial, that time will come if the appellant survives to an age of between 80 and 90 years. If there is a substantial fall in the value of the trust fund the time will come before the appellant reaches the age of 80.

Can it reasonably be said, in those circumstances, that the trustees may have power during the lifetime of the settlor to release the whole of the trust fund so that the settlor becomes beneficially entitled to the whole of it? I think it can. In my opinion, the word " may " must be construed in accordance with the principle of de minimis. There must be a real possibility of there being power to release the whole fund before the death of the settlor. I do not think that " may " means that there must be a probability in the sense that the event is more likely to happen than not to happen, but there must be more than a negligible possibility. I do not think that the possibility of there being power to release the whole fund before the death of the settlor is in this case negligible.

It was argued that, even if that be so, this is not the kind of power aimed at by the subsection. But I am of opinion that we must look, not at the nature or the apparent object of the power, but at its possible effect if it is exercised. Then the

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question arises: If the exercise of the power may release the whole of the trust fund and revest it in the settlor, is that power a power to determine the settlement? In my opinion, it is. It is not a power to revoke the settlement in the sense of cancelling or annulling it, but it appears to me that if there is nothing left for the trusts of the settlement to operate on, then the settlement can properly be said to have been determined or brought to an end. I am therefore of opinion that the first argument for the appellant fails and I pass to the second.

It might have been argued before the decision of this House in *Whitney* v. *Inland Revenue Commissioners*[2] that, because the appellant resides abroad, there is no power to make an assessment on her. But that argument is not now open and the appellant can only succeed by showing that, on a true construction of section 38 (2) it does not apply to this case. Construed literally it clearly does apply, and therefore the appellant must point to some word or phrase in it which can be given a limited meaning so as to exclude her case.

The appellant relies on certain observations made in *Astor* v. *Perry*,[3] but I do not think that that case helps her argument. There, a resident in the United Kingdom made a foreign settlement of property situated abroad and reserved power to revoke it. On a literal construction, section 20 of the Finance Act, 1922—the predecessor of the section we are now dealing with—would have applied as it taxed "any income" of which a person was able to obtain for himself beneficial enjoyment by exercising a power of revocation. But it was held that the words "any income" must be given a limited meaning and must mean income already charged to tax under the ordinary provisions of the Income Tax Acts. So the section did not bring new income into charge but it enacted with regard to income already chargeable that it should be deemed to be the income of a person other than the person entitled to receive it. That is precisely what the respondents seek to do in the present case. The income in the present case arises in the United Kingdom and the persons entitled to receive it are the Bermudan trustees: apart from section 38 (2), they would have to suffer payment of tax by deduction at the source. If the respondents are right this subsection requires this income to be treated as the appellant's income and not as income of the Bermudan trustees, with the result that, in addition to tax being payable at the standard rate, she is assessable to surtax in respect of it.

[2] [1926] A.C. 37; 42 T.L.R. 58.

[3] [1935] A.C. 398.

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The appellant's argument is that it would be unreasonable to suppose that Parliament intended to make a foreign resident liable for tax on income from property which he has ceased to own, and that the machinery provisions of the Act show that this was not intended. An equally strong argument based on the difficulty of applying machinery provisions was rejected by the majority of their Lordships in *Whitney* v. *Inland Revenue Commissioners*[4] and I do not think that it can prevail here. What appeared to me the most substantial point made was that the 1938 Act entitles a settlor who pays tax under section 38 (2) to recover that tax from the trustees who receive the income in respect of which it is paid, that it may not be possible to operate that relief against foreign trustees, and that section 38 (2) should only apply to a settlor who has available this consequential right of relief. To that argument there appear to me to be two answers. In the first place, if a settlor settles property situated in the United Kingdom by means of a foreign settlement, he takes the risk of difficulty in operating his right of relief. But, it was said, suppose that an American settlor settled American property by an American settlement and then the trustees invest trust property here: the American settlor would not have created the difficulty and he should not be chargeable. I think that the practical answer is that, if such a case ever arose, the Inland Revenue would probably be unable to recover anything from the American settlor because courts do not enforce liability to pay taxes in another country.

The second answer to this argument is that, if it is correct, it would also apply to relieve a resident in this country who settled property situated in this country by means of a foreign settlement. He also could say that it might not be possible to operate his statutory right of relief against the foreign trustees. But, in my opinion, it is clear that section 38 (2) is intended to apply and does apply to such a case. Section 38 (7) provides that it shall apply in relation to any settlement wherever made, and the provisions of section 41 (4) appear to me to be designed to meet such a case. With the experience of the Act of 1922 before them, it cannot have escaped the notice of those responsible for advising Parliament in 1938 that failure to include within the scope of section 38 (2) foreign settlements made by British residents would leave an easy and obvious loophole for evasion. The wording of the Act of 1938 satisfies me that this was appreciated and prevented.

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[4] [1926] A.C. 37.

Once it is determined that section 38 (2) applies to foreign settlements made by residents in the United Kingdom, I can find no way of construing any word or phrase in the Act in such a manner that foreign settlements made by foreign residents can be differentiated from foreign settlements made by persons resident here. Indeed, counsel for the appellant were unable to point to any word or phrase capable of a construction which would lead to that result.

In my judgment, this appeal should be dismissed.

LORD COHEN. My Lords, the question raised in this appeal is whether certain income (amounting to £24,127 6s. 7d.), arising during the fiscal year 1947–48 under a settlement dated September 24, 1947, being a settlement made by the appellant and governed by the law of the Island of Bermuda, should be included in the total income of the appellant for that year under the provisions of section 38 (2) of the Finance Act, 1938, notwithstanding that the appellant was not resident in the United Kingdom when the income arose. The question turns on the construction and effect of certain provisions of the Finance Act, 1938 (Part IV of Schedule III). The points in issue, shortly stated, are (a) whether section 38 applies to a settlement made by a non-resident settlor having non-resident trustees and governed by the law of a country other than the United Kingdom; and (b) whether a power given to trustees under a settlement from time to time to vest any part of the capital of the settled fund, not exceeding a certain specified amount in value, in the settlor is a power " to revoke or otherwise determine the settlement or any provision thereof " within the meaning of section 38 (2) in a case where the exercise of the power may ultimately exhaust the whole of the settled fund.

I find myself in such complete agreement with what your Lordships have said about the first point that I can state quite shortly my reasons for agreeing with the Court of Appeal that the appellant's argument thereon cannot be sustained.

Section 38 (7) provides that the foregoing provisions of the section shall apply in relation to any settlement *wherever* made (the italics are mine) and whether made before or after the passing of the Act. Section 41 (4) (*b*) provides that for the purposes of the part of the Act which includes section 38 the expression " settlement " shall include any disposition, trust, covenant, agreement or arrangement, and the expression "settlor" in relation to a settlement means any person by whom the settlement was made.

Prima facie the settlement of September 24, 1947, is a settlement, and Lady Kenmare is a settlor, within the meaning of section 38 (2). But, said Mr. Heyworth Talbot, on her behalf, it cannot have been the intention of Parliament to tax a non-resident person on income of which she has effectually divested herself or on income which has never been her income. As an illustration of the alleged preposterousness of the opposite view he instanced a case containing the following features: (1) a settlement made in the United States by a person resident in the United States; (2) the settled fund consisting of United States securities; (3) the trustees resident in the United States and having a power to revoke the settlement; (4) the settlement containing a provision that on such revocation the settled fund should revert to the settlor. Mr. Heyworth Talbot assumed that the trustees subsequently invested part of the settled fund in United Kingdom securities and asked rhetorically: "Can it be "that the foreign settlor is liable to pay surtax on the income "derived from those United Kingdom securities?" My Lords, that case is not before us, but my provisional answer must be: "Yes, because the Act in plain terms so provides."

Mr. Heyworth Talbot relied on the decision of your Lordships' House in *Astor* v. *Perry*,[5] a decision on section 20 of the Finance Act, 1922. In that case the securities comprised in the settlement were American securities and the majority of the House held that "any income" in section 20 must be confined to income chargeable with tax under the British Finance Act of the year. The material portion of section 20 was repealed by the Finance Act, 1938, and the language of section 38 (2) is so different that I cannot derive assistance from the decision in *Astor* v. *Perry* [5] on the meaning of section 20 of the Act of 1922. I do, however, derive assistance from the observation of Lord Russell of Killowen in his dissenting opinion, where he said [6]: "There must . . . be the necessary limitation which is "inherent in all our income tax legislation—namely, that what "is taxed under or by virtue of this provision can only be either "(1) income which is here, or (2) income of a person resident "here." This observation is not inconsistent with anything in the judgments of the majority in the case cited. Applying it to Mr. Heyworth Talbot's hypothetical case, it is plain that no tax would have been payable under section 38 (2) on the income from the settled fund so long as that consisted only of foreign securities because of the limitation on the meaning of the expression "income arising under a settlement" to be inferred from the concluding words of section 41 (4) (*a*).

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[5] [1935] A.C. 398.

[6] Ibid. 406.

In the present case your Lordships are dealing with a claim to tax on income which is here, and the language of the Act is plainly wide enough to bring that income within the ambit of the taxing provision.

Mr. Heyworth Talbot also said that his case was supported by the provisions of Schedule III, which contains machinery for giving effect to section 38, enables a settlor who had been compelled to pay tax under section 38 to recover what he has paid from the trustee or other person to whom income arises under the settlement, and contains other provisions to which it might be difficult to give effect in a case where the settlor and trustees were outside the jurisdiction.

My Lords, the language of section 41 (4) makes it clear that the legislature contemplated the possibility of the settlor being resident outside the United Kingdom, and I cannot derive from these machinery provisions any sufficient justification for cutting down the plain meaning of the language used.

I turn, therefore, to the second point. If the assessment is to stand, two conditions have to be satisfied. There is, however, no dispute as to the second condition. It is admitted that if the power contained in clause 5 of the settlement dated September 24, 1947, is a power, "whether immediately or in the future, and "whether with or without the consent of any other person, to "revoke or otherwise determine the settlement or any provision "thereof," the appellant will, on the power being exercised, become entitled to the whole or some part of the property comprised in the settlement.

Mr. Heyworth Talbot, however, submitted that it cannot be predicated that a time will ever come when, by an exercise of the powers given by clause 5, the trustees will be in a position to remove all remaining capital funds from the trust. That is true, but I agree with the reasons given by Morris L.J. for thinking that this submission does not afford a reason for setting aside the assessment.

The question is whether there is power to determine the settlement. I understand the word "determine" as denoting putting an end to the settlement. I agree that there can be no certainty that an exercise of the powers given by clause 5 will ever remove all the remaining capital funds from the trust. But I would adopt what was said by Morris L.J. in the course of his judgment in the passage which reads as follows [7]: "There is the "uncertain element of the length of life of the settlor. . . . There "is the uncertain element as to the value of the trust fund. It "may increase or appreciate or it may not. The value in the currency of Bermuda may fluctuate. Furthermore, it was submitted that, even if the result of the operation of clause 5 of the "settlement may be to exhaust the funds, there is even so no "revocation or determination of the settlement. But it seems "to me that if the trustees by one or more declarations bring "it about that the trusts concerning the greater part of the trust "fund were 'determined,' the time may come when the trustees, "by declaration made by them, may be in a position to exercise "their power so that it affects all the remaining part of the "trust fund: if so, the trusts concerning that remaining part of "the trust fund would 'forthwith determine.' Such a time "'may' come even though it may not seem likely that it will. "If the trustees were in that position they would 'have power "'. . . to . . . determine the settlement.' It seems to me "that the trustees 'may have' such power 'in the future.' "The wording of section 38 (2) (*a*) is, therefore, satisfied."

I would add that no argument appears to have been addressed to the commissioners based on the probability or improbability of the appellant, who was over 50 years of age when the settlement was executed, being alive at a date when the exercise of the powers given by clause 5 would finally exhaust the settled funds. I therefore express no opinion on the question what the position would be in a case where under a similar provision it is impossible or at least highly improbable that the funds would ever be exhausted by the due exercise of the alleged power of revocation.

For the reasons I have given, I agree that the appeal should be dismissed.

LORD KEITH OF AVONHOLM. My Lords, I agree with the result reached by your Lordships on the case as presented. It may be arguable in an appropriate case that "may have power" does not bring section 38 (2) into operation until the power is actually exercisable. In the present case the power increases cumulatively with every three-year period and at this moment is exercisable only over £240,000 of the trust fund calculated in the currency of the Island of Bermuda. As I shall develop in the case of *Saunders*, I think section 38 covers a power of partial revocation of a provision and on this view it might be proper to look at the state of the power at any particular moment of time. But I reserve my opinion on this line of construction.

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[7] [1956] Ch. 483, 498; [1956] 3 All E.R. 69.

I would dismiss the appeal.

LORD SOMERVELL OF HARROW. My Lords, I agree that the appeal should be dismissed for the reasons given by my noble and learned friend on the Woolsack.

Appeal dismissed.

Solicitors: *Theodore Goddard & Co.; Solicitor of Inland Revenue.*

F. C.

[HOUSE OF LORDS.]

INLAND REVENUE COMMISSIONERS . APPELLANTS;
AND
SAUNDERS AND OTHERS . . . . . RESPONDENTS

H. L. (E.)*
1957
July 3, 4, 25.

Revenue — Income tax — Settlement — Revocability — Power to apply capital for benefit of settlor's wife—Capital not to be reduced below £100—*Power "to revoke or otherwise determine settlement or any "provision thereof"—Meaning of "provision"—Finance Act*, 1938 (1 *&* 2 *Geo.* 6, *c.* 46), *s.* 38 (2).

The trustees of a settlement had power thereunder during an "appointed period" to apply any part of the capital of the trust funds for the benefit of a specified class including the settlor's wife, with a limitation that the capital of the trust funds should not be reduced below £100. After the appointed period the funds remaining were to be held on trust for the settlor's next-of-kin. Originally the sum of £100 was settled, but later the trust fund was increased to £25,100. For the year 1951–52 the settlor was assessed, under section 38 (2) of the Finance Act, 1938, to surtax on the income from the property comprised in the settlement:—

Held (Lord Keith of Avonholm and Lord Somervell of Harrow dissenting), that the power of the trustees was not a "power . . . to "revoke or otherwise determine the settlement or any provision

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD COHEN, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

"thereof" within section 38 (2) (*a*) of the Act of 1938 and, accordingly, the assessment was wrongly made.

Although a beneficial interest was in part determined, so long as £100 remained subject to the trusts, neither the settlement nor any provision thereof was determined, since the trust declared had not been determined.

Berkeley v. *Berkeley* [1946] A.C. 555; 62 T.L.R. 478; [1946] 2 All E.R. 154 considered.

Per Lord Keith of Avonholm. Looking at the whole language of section 38 (2) I am impelled to the view that removing a part of the settled fund from the trusts of the settlement for the benefit of the settlor or his wife is a determination of a provision of the settlement. . . . As the power of determination could be exercised in favour of the settlor's wife, nothing more was necessary to bring into operation the effect of section 38 (2).

Decision of the Court of Appeal (sub nom. *Saunders* v. *Inland Revenue Commissioners*) [1956] Ch. 509; [1956] 3 All E.R. 83 affirmed.

APPEAL from the Court of Appeal (Singleton, Morris and Romer L.JJ.).

This was an appeal from an order of the Court of Appeal made on July 2, 1956, allowing an appeal by the deceased respondent, Henry Arthur Waldron Saunders, from an order of the High Court (Wynn-Parry J.) dated July 27, 1955. By the latter order an appeal by the deceased respondent from a determination of the Commissioners for the Special Purposes of the Income Tax was dismissed and their determination was affirmed. The effect of the order of the Court of Appeal was to reverse the determination of the Special Commissioners and the decision of the High Court affirming it. The deceased respondent died on December 19, 1956, and, by an order of the Court of Appeal, his executors, Ethel Grace Saunders, Gordon Waldron Saunders and Raymond Henry Pumfrey, were substituted for him as the respondents herein.

The question to be determined depended on whether, as the appellants, the Commissioners of Inland Revenue, contended, the power conferred on the trustees of a settlement to pay or apply any part of the capital of the settled fund to or for the benefit of members of a class of persons, which included the deceased respondent's wife, but which was subject to the limitation that the capital of the trust fund should not by the exercise of the power be reduced below the value of £100 was a power "to revoke or otherwise determine the settlement or any provision thereof" within the meaning of section 38 (2) (*a*) of the Finance Act, 1938.

H. L. (E.)

1957

INLAND REVENUE COMMISSIONERS *v.* SAUNDERS.

The facts, stated by Viscount Simonds, were as follows: By a deed dated July 25, 1951, and made between the original respondent to this appeal (who has since died but will be referred to as "the respondent") of the one part and Gordon Waldron Saunders, Ethel Grace Saunders (the respondent's wife) and Raymond Henry Pumfrey as trustees of the other part, it was recited that the respondent was desirous of making such irrevocable provision as was thereinafter contained for the benefit of the specified class (an expression defined in the schedule and including the respondent's wife) and for the purpose of effectuating such desire had transferred to the trustees the sum of £100, and it was provided (by clause 1) that the trustees should invest as therein directed the said sum and any further sums which the respondent might thereafter transfer to them, by clause 2 that the trustees should hold the said sums and the investments for the time being representing the same upon the trusts thereinafter declared, by clause 3 that they should during the period therein specified pay, divide or apply the income thereof less any portion thereof the income whereof should have been appointed under the provisions thereinafter contained to or between or for the maintenance, support or benefit of the members of the specified class as the trustees might determine, and (by clause 5) that at the expiration of the appointed period the trustees should hold the trust fund or so much thereof as should remain subject to the trusts thereof upon trust for the next-of-kin of the respondent as therein defined. The specified class was a large one and nothing need be said about it except that it included the respondent's wife. Clause 4 was in the following terms: "It shall be "lawful for the trustees at any time or times during the appointed "period but subject to the consent in writing of the settlor "during his life thereafter at their absolute discretion to pay "or apply any part or parts of the capital of the trust funds "to or for the benefit of all or any one or more to the exclusion "of the other or others of the specified class freed and released "from the trusts concerning the same *provided always* "that during the life of the settlor any exercise by the trustees "with such consent as aforesaid of the power in this clause "contained shall be subject to the limitation that the capital of "the trust funds remaining subject to the trusts of this settlement immediately after such exercise shall be of a value of "not less than £100."

On August 13, 1951, the original respondent transferred a further sum of £25,000 to the trustees, who invested it in 250,000 ordinary shares of 2s. each in H. A. Saunders Ltd. In the year ended April 5, 1952, the gross income arising under the settlement was £4,166 13s. 4d. An additional assessment to surtax which included this income was made on the respondent.

Geoffrey Cross Q.C., *Sir Reginald Hills* and *E. B. Stamp* for the appellants. In this case the House is concerned with the question of revocability of the settlement. There is no question of extraterritoriality.

The provision for the remainderman would be determined if all the money were paid out to the tenant for life. The power of reducing the provision to a minimum is, in effect, a power to substitute a new provision, determining the original provision. The essential nature of the provision would be altered. One must distinguish between the trusts of the settlement and the power in question. When the power is exercised the part of the property in respect of which it is exercised is freed and released from the trusts concerning the settlement. The effect of that is to determine the original trust provision, substituting a life interest in the rest of the property and bringing into existence a provision for the person in whose favour the power is exercised. Or it may be said that each pound in the trust fund is a separate provision, so that, if £X is released, X provisions are determined and the remainder remains unaltered.

The words " a corresponding part of that property " in section 38 (2) indicate the possibility of a partial revocation of the settlement. They throw light on the meaning of the words " revoke or " otherwise determine the settlement or any provisions thereof."

The Crown's submissions give a reasonable construction to section 38: see *Inland Revenue Commissioners* v. *Kenmare.*[1]

John Pennycuick Q.C. and *Roderick Watson* for the respondent. There is no doubt as to the character of clause 4 of the settlement. It is designed as an escape from section 38 and it achieves that purpose. It empowers the trustees to take out of the settlement part of the trust funds and to apply it in a certain manner with the consequence that the fund will be reduced. There is not a power to " revoke or otherwise determine the " settlement or any provision thereof," because there will always be £100 left in the settlement. This is in accordance with the literal and natural meaning of the words, and *Inland Revenue Commissioners* v. *Wolfson*,[2] which is in point in this case,

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[1] [1956] Ch. 483, 493, 499; [1956] 3 All E.R. 69.

[2] (1949) 65 T.L.R. 260, 262, 263; [1949] 1 All E.R. 865.

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indicates that the House is concerned to give a natural construction to section 38 (2) and not to strain its meaning. The proviso as to the £100 is effective to achieve its object.

To " revoke " denotes a cancellation of the settlement so that the fund affected comes back to the settlor under a resulting trust. " Otherwise determine " indicates an exercise of a power to transfer the whole capital to a named beneficiary or one of a named class free from any of the trusts of the settlement, e.g., under a power of advancement. The real contest throughout has been as to the meaning of the words " any provision thereof " in section 38 (2) (*a*). It is to be noted that the provision must be a provision of the settlement (" thereof "). As to the meaning of " provision," see *Berkeley* v. *Berkeley*.[3] One never speaks of " revoking " the trust property; one revokes a clause or a provision or a beneficial interest under a clause, and to these the word is applicable, but it is not applicable to a res. The word " provision " cannot indicate the trust fund or items of property comprised in it. The phrase " any provision thereof " means any clause in the settlement or any beneficial interest created by the settlement. If a clause is determined, the beneficial interest which it has created is determined and vice versa. But here there has been no revocation of a provision and no determination of a beneficial interest. If the word " provision " means a clause, no one has the power to determine a provision merely because he has the power to reduce the trust fund to which the clause in question relates.

Accordingly, here there is no power to determine the settlement or any provision of it. If the section had contained the words " as to the whole or any part of the settled property," the Crown's contention would be well founded and the contrary would be unarguable, but those words are not here. There is a radical difference between determining a benefit and diminishing it.

Geoffrey Cross Q.C. replied.

Their Lordships took time for consideration.

July 25. VISCOUNT SIMONDS. My Lords, this appeal by the Commissioners of Inland Revenue again raises the question of the scope and meaning of section 38 (2) of the Finance Act, 1938. The relevant facts are not in dispute. [His Lordship stated the facts, reading clause 4 of the settlement, and continued:] The proviso to this clause, which might otherwise seem inexplicable, is in fact easily explained. Its avowed purpose is that the settlement may escape from section 38 of the Finance Act, 1938. The question for your Lordships is whether it is successful in its purpose, as the Court of Appeal, allowing an appeal from Wynn-Parry J., have held that it is.

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[3] [1946] A.C. 555, 565–566; 62 T.L.R. 478; [1946] 2 All E.R. 154.

Before turning to the Act of Parliament it only remains to be said that within a few days after the execution of the deed the respondent transferred a sum of £25,000 (making £25,100 in all) to the trustees, who invested it in 250,000 ordinary shares of 2s. each in H. A. Saunders Ltd., and that in the year ended April 5, 1952, the gross income arising under the settlement was £4,166 13s. 4d. and that an additional assessment to surtax which included this income was made upon the respondent.

This assessment was founded on section 38 (2) of the Finance Act, 1938, which is, so far as is relevant, in the following terms: "If and so long as the terms of any settlement are such that— "(*a*) any person has or may have power, whether immediately "or in the future, and whether with or without the consent of "any other person, to revoke or otherwise determine the settle- "ment or any provision thereof; and (*b*) in the event of the "exercise of the power, the settlor or the wife or husband of the "settlor will or may become beneficially entitled to the whole or "any part of the property then comprised in the settlement or "of the income arising from the whole or any part of the property "so comprised; any income arising under the settlement from "the property comprised in the settlement in any year of assess- "ment or from a corresponding part of that property, or a "corresponding part of any such income, as the case may be, "shall be treated as the income of the settlor for that year and "not as the income of any other person . . ."

It is clear that an exercise of the power contained in clause 4 during the respondent's lifetime might result in his wife becoming beneficially entitled to a part of the property comprised in the settlement. The single question is whether the power is a power to "revoke or otherwise determine the settlement or any pro- "vision thereof." The answer given by the respondent is that it is not, because always there must be £100 left in the settlement and, so long as it is there, neither the settlement nor any provision thereof can be properly described as revoked or otherwise determined. This, it was claimed, was the natural and literal meaning of the words, and the observations which fell from myself and others of your Lordships in *Inland Revenue*

Commissioners v. *Wolfson* [1] were called in aid. I am assuredly not going to depart from the fair meaning of words in a taxing section in order that tax may be exacted. It is not so easy to say what is a fair meaning of the relevant words.

I must first clear out of the way one argument which was, I think, given undue weight in the Court of Appeal. The question being whether there is a power to revoke or determine a settlement or any provision thereof, it is not, in my opinion, proper to attribute continuance or non-determination to the settlement or any provision thereof because the power itself still subsists. What is relevant is whether and in what sense the trusts declared by clause 3 and clause 5 have been determined: the power, though it may for some purposes like a power of advancement be regarded as part of the trusts of the settlement, is in this connexion to be regarded as something independent of the beneficial trusts which it may itself determine.

It was upon the meaning of the word "provision" that the decision of the majority of the Court of Appeal largely turned. Thus, Singleton L.J. thought that the words "of any provision "of the settlement" at the end of section 38 (1) (*a*) and in section 38 (1) (*b*) meant a clause in the document and that the word "provision" ought to be given the same meaning in section 38 (2). He therefore could not accept the argument of counsel for the Crown. Morris L.J., too, though not ignoring other aspects of the case, concluded by saying [2]: "The submis-"sion of the Crown further fails if the word 'provision' denotes, "as in my judgment it does, a clause or part of the settlement "deed or agreement."

My Lords, the meaning of the word "provision" in an Act of Parliament was discussed in this House in *Berkeley* v. *Berkeley*,[3] and it was then necessary to determine which of two possible meanings it bore in that Act, viz., a clause in a document (in that case a will) or a benefit conferred by that clause or document. But it was pointed out in that case that the two meanings very easily slid into each other and I doubt, with great respect, whether in the present case the distinction need be preserved. It was indeed patent that learned counsel for the respondent accepted the view that in its present context the word meant indifferently a clause or a beneficial interest: he candidly admitted that a clause could not be "determined" without also determining the beneficial interest which it created and vice versa. Rather he was concerned to maintain that no beneficial interest (assuming that to be the meaning of "provision") was determinable within the section.

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[1] (1949) 65 T.L.R. 260; [1949] 1 All E.R. 865.

[2] [1956] Ch. 509, 521; [1956] 3 All E.R. 83.

[3] [1946] A.C. 555; 62 T.L.R. 478; [1946] 2 All E.R. 154.

The issue is thus brought within narrow limits. It is whether the words "revoke or otherwise determine the settlement or any "provision thereof" are satisfied if the settlement is in part revoked or (more appositely) if a beneficial interest created by the settlement is in part determined. Let me take a concrete case. The beneficial interest which is said to be liable to be determined is the life interest of A in a capital fund of £100,000: the trustees in the exercise of their power withdraw from the trust £10,000 or £50,000 or £90,000. Upon such withdrawal is the beneficial interest of A determined? Is there on each withdrawal a new beneficial interest created and on the next withdrawal a new determination? Alternatively, is each £ or other unit of the trust income to be regarded as a separate provision, so that upon the withdrawal of the relevant capital it can be said that a provision for A has been determined? I do not think that either of these explanations is plausible. Yet one or other of them must be adopted if a provision of the settlement or a beneficial interest created by it is to be regarded as determined by the diminution of it in greater or less degree. The problem may be stated in a slightly different way, perhaps more attractive to the appellants' case. I can well imagine that a beneficiary for whom the handsome provision of (say) £5,000 a year has been made would say, upon finding it cut down to £50 a year, that he no longer enjoyed the provision he formerly had. Colloquially, he was no longer provided for. But he would in fact be provided for, though on a less handsome scale and it would be a provision made by the settlement. Therefore the same question would have to be asked: has the earlier provision been determined and a new one substituted? Or would it be more accurate to say that the provision made for him had been not "determined" but diminished? This is to put in other words the question that I asked earlier—Does the word "revoke" include partial revocation and the word "determine" include partial determination? I do not think that it does. A purist would, I think, say that there can be no such thing as a partial determination of a single provision. An end is an end and there is no part left. At any rate nothing could be easier than to use words appropriate to the revocation or determination of part of a provision if it were intended to cover the reduction of a provision for any person or body of persons, and I think that I should not be justified in giving a strained meaning to the words which the legislature has preferred to give. I do not ignore that the subsection contemplates that the interest of the beneficiary may be in a part of the settled property, but it appears to me that this is indecisive, for the "provision" made for him may be in whole determined but extend to part only of the settled property. Since writing this opinion I have had the advantage of reading the opinion of my noble and learned friend, Lord Reid, and I agree with what he has written on this part of the case.

I have come therefore to the conclusion that the appeal must be dismissed. The appellants must pay the costs.

LORD REID. My Lords, in a plain and obvious attempt to evade the provisions of section 38 (2) of the Finance Act, 1938, and avoid liability for surtax the late Mr. Saunders made a settlement on July 25, 1951, and the question in this case is whether that attempt has been successful. On that date he transferred to trustees £100 and directed them to hold that sum and any further sum which he might thereafter transfer to them for the benefit of a specified class of beneficiaries including his wife. On August 13, 1951, he transferred a further sum of £25,000 to the trustees. The settlement contained this provision.

[His Lordship read clause 4 and continued:] It is not disputed that, apart from this proviso, the terms of clause 4 would bring this case directly within the scope of section 38 (2): the trustees would have power immediately to determine the whole settlement by freeing the whole of the trust funds from the trusts of the settlement and paying them to the settlor's wife. I shall not repeat here what I have said in *Countess of Kenmare* v. *Inland Revenue Commissioners*[4] about the word "determine." Section 38 (2) clearly provides that in such a case the whole of the income from the trust fund must be treated as the income of the settlor. But the proviso requires that, so long as the settlor survives, at least £100 must be retained by the trustees and must remain subject to the trusts of the settlement. £100 is no doubt a comparatively small sum, but it is capable of being invested and of yielding an income, and I do not think that it can be treated as negligible. Accordingly, in my opinion, the presence of the proviso prevents the trustees' power from being a power to determine the settlement. The question therefore is whether the power, limited as it is by the proviso, can be said to be a power to revoke or otherwise determine any provision of the settlement.

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[4] Ante, pp. 267, 279.

It has not been argued that the word " determine " can mean anything else than " bring to an end." It cannot mean " modify " or " diminish." Accordingly, the subsection cannot apply unless there is power to bring something to an end. The presence of the word " revoke " does not help because the phrase used is " revoke or otherwise determine." The word " other-" wise " shows that revoking is regarded as one method of determining or bringing to an end either the settlement or any provision thereof.

There has been much argument about the meaning of the word " provision." In the first place the word " thereof " makes it clear that the subsection is referring to something that can properly be called a provision of the settlement. And, secondly, the provision must be of such a nature that the result of determining it will or may be that the settlor or his wife becomes beneficially entitled to the whole or a part of the property comprised in the settlement or of the income arising from it. " Settlement " is defined in section 41 (4) (*b*) as follows: " the " expression ' settlement ' includes any disposition, trust, coven-" ant, agreement or arrangement," and a provision of a settlement would normally mean some part of it. But, as was pointed out in *Berkeley* v. *Berkeley*,[5] provision is often used in the sense of what is provided, and I think that if a settlement gives a beneficial right to X that right can properly be said to be a provision of the settlement. It is therefore necessary to examine the beneficial rights given by this settlement and to see whether the exercise of the power could properly be said to determine any of them.

Clause 3 leaves it to the discretion of the trustees to pay the income from the trust fund to or for behoof of any one or more members of the specified class but requires them to distribute the income annually. Clause 5 makes provision for distributing the fund or what remains of it at the end of the appointed period. During the lifetime of the settlor there must always remain £100, the income from which must be distributed in terms of clause 3. After his death and during the remainder of the appointed period the trustees may pay away the whole of the trust fund: if they do not, then at the end of the appointed period clause 5 comes into operation. I do not think it necessary to consider clause 5 further because, if paying away part of the trust fund under clause 4 does not determine any provision of clause 3, a fortiori it does not determine any provision of clause 5.

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[5] [1946] A.C. 555.

Clause 3 directs the trustees to apply the income of the trust funds "less any portion thereof the capital whereof shall have "been appointed under the provisions hereinafter contained." I attach no importance to those words. Clauses 3 and 4 must be read together and without these words clause 3 could only operate on the income of what capital remained at the time. Nor do I think that it makes any difference that no particular member of the specified class can demand any part of the income, it being for the trustees to determine to which members the income shall be paid. Perhaps, if any preference were given to one or more members, diminution of the trust fund could result in the rights of the others being determined, but that is not the case here. This case seems to me to be the same as it would be if clause 3 had simply directed the trustees to pay the income from the trust fund to A. B.

I ask the question: What "provision" is brought to an end by reducing the amount of the trust fund from £25,000 to £100? Two suggestions were made by counsel for the appellants. The first was that the depletion of the trust fund by exercising the powers in clause 4 would essentially alter the nature of the "provisions" so that it could properly be said that the original provisions had been determined and new and different provisions had come into existence with regard to what was left of the trust fund. Apart from the artificiality of this conception, I see one fatal objection to it. *Berkeley* v. *Berkeley*[5] is an example of a case where it is material to determine the date when a provision was made. On this view the date when provisions operating at a particular time came into being would not be 1951 but would be the last date when the trustees paid away capital under clause 4. That, in my view, cannot be right. Moreover, who makes the new provisions with regard to the capital remaining in the settlement? They must surely flow from the settlor and I find it very difficult to construe the settlement as authorizing the trustees to make new provisions whenever they pay away capital. It might perhaps be said that payment of small sums would not determine the old provisions but that payment of more than 99 per cent. of the trust fund does determine them. But suppose the trustees pay away the capital £1,000 at a time. At what stage are the old provisions determined and new ones substituted? I am quite unable to accept this suggested way of finding that provisions are determined or brought to an end.

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[5] [1946] A.C. 555.

The appellants' alternative suggestion was that each pound (or, I suppose, each penny) of the trust fund is a separate provision so that, if £X is released from the settlement, X provisions are determined and 25,100 – X provisions remain unaltered. This appears to me to be an even more artificial conception than the last, and I ask what happens if the value of the trust fund appreciates. Does each £1 provision become a provision of £1 1s. or does the appreciation create a number of new £1 provisions: if so, who makes these provisions? And if the trust fund depreciates in value does each provision become one of 19s. or do some just disappear? And if depreciation results in each £1 provision becoming a provision of 19s. why does paying out 5 per cent. of the trust fund under clause 4 not have the same result but cause a number of provisions to determine while the rest remain unaltered? I find it equally impossible to adopt this suggestion.

There is one other argument for the appellants that I must notice. The second condition for the application of the subsection, set out in section 38 (2) (*b*), is that, in the event of the exercise of the power, the settlor will or may become beneficially entitled to the whole or any part of the property; and, where the exercise of the power only entitles the settlor to a part of the property, the next part of the subsection provides that any income arising from " a corresponding part of that property " shall be treated as the income of the settlor. It is said that this throws light on the meaning of " revoke or otherwise determine " the settlement or any provision thereof " in the first condition set out in section 38 (2) (*a*). I do not think so.

The subsection requires two conditions to be satisfied—those set out in (*a*) and (*b*) of section 38 (2), and it is not difficult to imagine cases where both conditions are clearly satisfied although only a part of the trust fund reverts to the settlor (or his wife). In the first place the settlement may be wholly determined but only part of the trust fund may revert: the settlement may provide that, in the event of power to determine it being exercised, half the trust fund shall revert to the settlor and the rest go to his issue. Or, secondly, a provision of the settlement may be wholly determined but only part of the trust fund be affected by that: for example, a settlor might settle property on his four children in equal shares and reserve power to revoke the interest of one child but not of the others. The exercise of such a power would wholly bring to an end the provision in favour of one child but the result would be that only part of the property, one quarter, would revert to the settlor.

This argument for the appellants seems to me to be based on the view that condition (*a*) must be so construed that it must be held to apply whenever condition (*b*) is satisfied. I see no reason why that should be so. In the present case condition (*b*) is satisfied because in the event of the exercise of the power part of the settled property will revert to the settlor. But that seems to me to throw no light on the question whether condition (*a*) is also satisfied. I therefore adopt the simple explanation of this case that when part of the capital is paid away—or for that matter is lost by depreciation of investments—the provisions of the settlement remain the same but their value to the beneficiaries decreases. That would be so whether one takes the word "provision" to mean a part of the settlement or a right given by the settlement. If that be true, then nothing would be determined or brought to an end by paying away part of the trust fund and therefore there is no room for the application of section 38 (2).

If the words of a statute are reasonably capable of two interpretations it is right to adopt that which will prevent evasion, provided that this course does not lead to some other difficulty or injustice. But in this case I can find no interpretation favourable to the appellants which can survive analysis. In a case like the present, one may well be tempted to strain words, but for two reasons I do not think that that would be right.

In the first place, I see no way of construing the subsection, even by straining words, which would bring this case within its scope without at the same time bringing in genuine cases which Parliament may well have desired and might now desire to exclude. For example, trustees may have power to return capital to the settlor for certain specific purposes and it may be unlikely that any substantial sum could ever be paid back to him, but nevertheless it may be possible that in some improbable event the power would extend to a large proportion of the trust fund. Are the words of the Act to be strained to bring in such cases? And if they are, how is condition (*b*) to be applied? Is the proportion of the trust income which is to be treated as the income of the settlor to correspond to the largest proportion of the trust fund which the exercise of the power may enable the trustee to repay to the settlor, using the word "may" in the sense which I have explained in the *Countess of Kenmare's* case[6]? It appears to me that it ought to be for Parliament to consider how far, if at all, such cases should come within the scope of this legislation, and that it may be a difficult task to amend the subsection so as to reach a just result.

That brings me to my second reason. It is sometimes said that we should apply the spirit and not the letter of the law so as to bring in cases which, though not within the letter of the law, are within the mischief at which the law is aimed. But it has long been recognized that our courts cannot so apply taxing Acts, and I venture to repeat what I said in *Inland Revenue Commissioners* v. *Wolfson*[7]: "I would express my agreement with my "noble and learned friend Lord Simonds that it is not the "function of a court of law to give to words a strained and un-"natural meaning because only thus will a taxing section apply "to a transaction which, had the legislature thought of it, would "have been covered by appropriate words." Indeed, I am not at all sure that, if the legislature had foreseen the device used in this case, it would have been easy to find appropriate words which would cover it without also covering cases which ought to be excluded. I am therefore of opinion that this appeal should be dismissed.

LORD COHEN. My Lords, I agree generally with the observations both of the noble and learned Lord on the Woolsack and of the noble and learned Lord, Lord Reid. I will, therefore, limit myself to dealing with the one point on which I am inclined to differ from them.

It relates to the meaning of the word "provision" in section 38 (2) of the Finance Act, 1938. I agree with Lord Reid that if a settlement gives a beneficial right to X that right can, in common parlance, be said to be a provision of the settlement. But where the word is used in a statute it has to be construed in the context of the statute as a whole and in particular in the present case in the context of the whole of section 38. I agree with Singleton L.J. that the word "provision" in the phrase "of any provision of the settlement" which is to be found at the end of section 38 (1) (*a*) and at the end of section 38 (1) (*b*) must mean a clause in the document. Prima facie the same word should be given the same meaning throughout the section and, although the rule is not absolute, I see no sufficient reason for giving a different meaning to "provision" where that word occurs in section 38 (2).

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[6] Ante, pp. 267, 278.

[7] 65 T.L.R. 260, 263.

I do not pursue the matter further since on this construction it is plain that it cannot be said that the operation of any clause of the settlement would be determined—that is, put an end to—by the exercise of the power conferred by clause 4 of the settlement. Clauses 3 and 5 would continue to operate on the £100 which must be left in the settlement.

For these reasons I agree that the appeal should be dismissed.

LORD KEITH OF AVONHOLM. My Lords, it seems to me reasonably clear that when the Finance Act, 1938, by section 38, refers to a power "to revoke or otherwise determine the settlement or "any provision thereof" it is referring to a settlement or provision conferring a benefit or benefits. In many cases it will matter nothing whether one construes "provision" as meaning the words in a settlement conferring a benefit or the benefit conferred by words in a settlement. If a settlement is revoked or determined the benefits conferred fall with it, and so also if the words of a clause conferring a benefit are revoked or determined. Difficulty arises only where, as here, the power to revoke or determine is limited to a power to revoke or determine part of the benefit made in favour of a particular person or persons. In speaking of part of a benefit I mean, of course, not part of a number of separate benefits but part of what may be thought to be a single benefit.

My Lords, the settlement here has been skilfully drawn. The trusts of the settlement apply only to whatever is to be found in the trust fund at any time. Allowing for the full exercise by the trustees of the powers given to them by clause 4 of the settlement, the trust fund can never fall below £100 in value. Thus the provision, it is said, even if "provision" be read as meaning "benefit conferred," never changes. The settlor has conferred nothing more than the income and the capital of what the trustees choose to leave in the trust fund, subject to the minimum of £100. This view found favour with Morris and Romer L.JJ. in the Court of Appeal.

This, I think, is to take too narrow a view. The Act is not concerned, in my opinion, with subtleties of conveyancing. It is directed to securing that "any income arising under the "settlement from the property comprised in the settlement in

" any year of assessment or from a corresponding part of that " property, or a corresponding part of any such income, as the " case may be, shall be treated as the income of the settlor for " that year and not as the income of any other person " where there exists in any person the specified power of revocation or determination, with the result of taking out of the settlement the whole or part of the property or income of the settled fund for the benefit of the settlor or the settlor's wife or husband. Looking at the whole language of section 38 (2) I am impelled to the view that removing a part of the settled fund from the trusts of the settlement for the benefit of the settlor or his wife is a determination of a provision of the settlement.

To state the position in another way, the reality of the transaction, in my opinion, was that the settlor made two provisions, one a provision of the income and capital of so much of the settled fund as should be at any time above £100 in value, which was subject to the trustees' power of determination under clause 4 of the settlement, and the other a provision of the income and capital of £100 which was not subject to this power of determination.

As the power of determination could be exercised in favour of the settlor's wife nothing more was necessary to bring into operation the effect of section 38 (2) of the statute.

I would allow the appeal.

LORD SOMERVELL OF HARROW. My Lords, the reference in section 38 (2) (*b*) to " any part of the property " shows that the subsection was intended to cover powers by the exercise of which the beneficial interest of part only of the settled property went to the settlor or the settlor's wife or husband. The taxpayer in the present appeal agreed that if in the present case the settlement had provided for a total revocation, £25,000 going to the settlor and £100 to charity, the settlement would have been within the section. It is said not to be within the section because the £100 is left in the settlement; there is no total revocation or determination.

The words " any provision thereof " show that it was intended to cover powers the exercise of which fell short of total revocation or determination of the whole settlement, considered, of course, apart from the " term " which confers the power. If there had been in this case one clause which conferred the discretionary power on the trustees in respect of the £25,000 and another clause which conferred the discretionary power on the

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trustees in respect of the £100, I find difficulty in seeing how the argument for the taxpayer could start. It is said, however, that where, as here, the trusts on the funds are declared in one clause, there is not a revocation or determination of any provision of the settlement if any funds, however small, are left subject to the trusts. No provision, it is said, has been revoked or determined.

I do not think that in its context in this clause "provision" can be so construed.

I am giving, I think, a natural meaning to the word as applied to a settlement. What are the provisions of a settlement? The first matter with which the answerer would naturally deal would be the amount of the settled fund. I think a provision is revoked or determined if, as in the present case, £25,000 is taken out of the settlement. The question of construction does not, of course, turn on the amount taken out.

I would allow the appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Henry Pumfrey & Son.*

F. C.

[HOUSE OF LORDS.]

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July 8, 9, 10, 11, 15; *Oct.* 21.

REGAZZONI . . . . APPELLANT;

AND

K. C. SETHIA (1944) LTD. . . . . RESPONDENT.

Contract—Illegality—Foreign prohibition—Contract for sale of jute c.i.f. European port—Intention that contract goods be shipped from India for resale to South Africa—Prohibition by Indian Government of export of goods to South Africa—Repudiation of contract—Not enforceable in English courts.

Conflict of Laws—Confiscatory or political legislation.

The respondents agreed to sell and deliver to the appellant jute bags, both parties contemplating that they should be shipped from India to Genoa for resale in South Africa. The parties were also aware that the export of jute from India to South Africa was prohibited by Indian law. English law was the proper law of the contract. The respondents repudiated the contract:—

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD COHEN, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

Held, that the contract was unenforceable since an English court will not enforce a contract, or award damages for its breach, if its performance would involve doing an act in a foreign and friendly State which violates the law of that State. This principle is based on public policy and international comity. It does not follow from the fact that today the court will not enforce a revenue or penal law at the suit of a foreign State that today it will enforce a contract which requires the doing of an act in a foreign country which violates such law, but, whether or not an exception must still be made in regard to the breach of a revenue law in deference to old authority, the present case could not fall within any such exception.

Foster v. *Driscoll* [1929] 1 K.B. 470; 45 T.L.R. 185 applied.

Holman v. *Johnson* (1775) 1 Cowp. 341 distinguished and dictum that "no country ever takes notice of the revenue laws of "another" doubted.

Per Lord Somervell. In any event I myself think that the courts of this country should not today enforce a contract to smuggle goods into or out of a foreign and friendly State.

Per Lord Somervell and Lord Reid. A foreign law, the enforcement of which was against morals, might be one to which the English courts will not pay regard.

Decision of the Court of Appeal [1956] 2 Q.B. 490; [1956] 2 All E.R. 487 affirmed.

APPEAL from the Court of Appeal (Denning, Birkett and Parker L.JJ.).

This was an appeal by leave of the Appeals Committee of the House of Lords (Lord Morton of Henryton, Lord Keith of Avonholm and Lord Somervell of Harrow) granted on June 21, 1956, from a judgment of the Court of Appeal given on April 26, 1956, whereby the court unanimously dismissed the appeal of the appellant, Polisseno Regazzoni, from the judgment of Sellers J. given on December 19, 1955, dismissing an action by him against the respondents, K. C. Sethia (1944) Ltd., an English company, for damages for breach of a contract made in September, 1948, and ordered that the appellant pay the costs of the appeal.

The facts as stated by Viscount Simonds were as follows: The appellant, who resided in Switzerland, brought the action out of which this appeal arose against the respondents claiming damages for breach of contract. He alleged that the respondents had agreed to sell and deliver to him September/October, 1948, c.i.f. Genoa 500,000 jute bags of the quality and standard known in the trade as new B twills and that they had wrongfully repudiated the agreement. The respondents defended the action on numerous grounds, with only one of which the House of Lords were now concerned, namely, that "the said contract, if any,

" was to the [appellant's] knowledge an illegal contract and/or " was void and unenforceable in that it had for its purpose " an object which was illegal and/or contrary to public policy, " namely, the taking and shipment of jute goods from India " where the ultimate destination was the Union of South Africa, " in breach of " a certain Act of the Indian Parliament and Regulations made thereunder.

The Act in question was the Sea Customs Act, 1878, which (as modified up to December 1, 1950) provided by section 19 that the Central Government might " from time to time by notification in the [Official Gazette] prohibit or restrict the bringing " or taking by sea or by land goods of any specified description " into or out of [the States across any customs frontier as defined " by the Central Government]," and by section 134 that the Central Government might from time to time by similar notification " prohibit at any specified port or at all ports, " the transhipment of any specified class of goods, generally " or when destined for any specified ports." By section 138 of the Act provision was made for security for the due shipment, export and landing of goods and by section 167 for the punishment of offences. The prescribed penalties were severe. It was provided that if any goods, the importation or exportation of which was prohibited or restricted by or under the Act, should be imported into or exported from India contrary to such prohibition or restriction, or if any attempt should be made so to import or export any such goods, the goods themselves should be liable to confiscation, and any person concerned in any such offence should be liable to a penalty not exceeding three times the value of the goods or not exceeding 1,000 rupees.

In exercise of the powers conferred by this Act on July 17, 1946, the Central Government of India duly made an order prohibiting the taking " by sea or by land out of British India " of goods from whatever place arriving which are destined for " any port or place in the Union of South Africa or in respect " of which the Chief Customs Officer is satisfied that the goods " although destined for a port or place outside the Union of " South Africa are intended to be taken to the Union of South " Africa."

The facts which appeared to Lord Reid to be material were (1) that both parties knew that it was impossible to obtain so large a quantity of B twills for early shipment from any source other than India; (2) that, to the knowledge of the respondents, the appellant intended to sell the goods for shipment to the Union of South Africa; (3) that both parties knew that the law of India prohibited the export from India of goods destined to South Africa directly or indirectly; and (4) that the respondents intended, and the appellant knew that they intended, to evade the Indian prohibition by finding a shipper in India who would not ask inconvenient questions about the destination of the goods and who would be able to get the goods out of India. It appeared that there was a great demand for B twills in South Africa and that large profits could be made by evading the Indian prohibition and finding means to get these goods from India to South Africa.

Neil Lawson Q.C., *E. J. Cohn* and *L. J. Blom-Cooper* for the appellant. The proper law of the contract was English law and neither of the parties resided or traded in India. The following questions arise: (1) Did the performance of the contract to the knowledge or in the intention of the appellant necessarily involve a breach of Indian law? (2) If so, then, having regard to the fact that the proper law of the contract was English law, was the contract unenforceable because Indian law would or might be violated by the performance? (3) Was *Foster* v. *Driscoll*[1] rightly decided or is it distinguishable? (4) Should the English courts take notice of and give effect to the Indian law in question, having regard to its particular character in that (a) it was in the nature of a hostile act directed at another friendly Commonwealth State, and (b) it was part of Indian public law of a political or revenue or penal character?

As to the first question, performance did not necessarily involve a breach of Indian law. The expert evidence showed that a vital point in Indian law, ignored in the courts below, was that it distinguished between direct and indirect export. The law was not directed against persons outside the Indian jurisdiction. Further, mens rea was essential to a violation of the regulation. The appellant's part in the performance of the contract was not tainted by illegality. If an Indian shipper was unaware of the final destination of the goods, he would not be subject to a penalty and the transaction might have been carried through without either he or the Chief Customs Officer being aware of it.

But assuming that the appellant is wrong on the first question, then, on the second question, where English law is the proper law, the courts will only refuse to enforce a contract on the ground of foreign illegality where the contract for its performance requires a party to it to do an act in a foreign country which is illegal according to the place of performance: see Dicey's Conflict of Laws, 6th ed., pp. 604, 630, 637, 641, and *Ralli Brothers* v. *Compañia Naviera Sota y Aznar*.[2] Reliance is placed on *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.*[3] and *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft.*[4]

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[1] [1929] 1 K.B. 470; 45 T.L.R. 185.

A violation of foreign law may be contemplated by the parties as incidental to the contract but not part of it. There is also a distinction between intention and active participation: see *Holman* v. *Johnson*[5]; *Biggs* v. *Lawrence*[6]; *Hodgson* v. *Temple*[7]; *Pellecat* v. *Angell*[8] and *Waugh* v. *Morris.*[9] Where there is mere incidental illegality involving the violation of foreign law the English courts will disregard the foreign law, always assuming that the foreign country in question is not the place of the performance of the contract. See also *Boucher* v. *Lawson*[10]; *Planché* v. *Fletcher*[11]; *Lever* v. *Fletcher*[12] and *Sharp* v. *Taylor.*[13]

Even assuming that the findings as to illegality by Indian law were right, the Court of Appeal were wrong in treating that as affecting the enforceability of the contract because: (1) Here the proper law of the contract was English law. (2) The contract did not necessitate or require one of the parties to do an act which was unlawful by Indian law in the performance of the contract. (3) If and so far as active participation in an illegality is an element in the unenforceability of the contract, there was no active participation so far as concerned the appellant or the respondents.

As to the third question relating to *Foster* v. *Driscoll*,[14] that case is either distinguishable, or, if it is not distinguishable, it was wrongly decided. In *Carling Export Brewing and Malting Co. Ltd.* v. *Rex*[15] its correctness was left open. It is distinguishable because the real ground of the majority's decision was the active participation of all parties in the enterprise of breaking United States law. It could be put on the same basis as the

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[2] [1920] 2 K.B. 287, 291, 295, 300, 303; sub nom. *Sota and Aznar* v. *Ralli Brothers*, 36 T.L.R. 456.

[3] [1939] A.C. 277; 55 T.L.R. 402; [1939] 1 All E.R. 513.

[4] [1939] 2 K.B. 678; 55 T.L.R. 814; [1939] 3 All E.R. 38.

[5] (1775) 1 Cowp. 341.

[6] (1789) 3 Term Rep. 454.

[7] (1813) 5 Taunt. 181.

[8] (1835) 2 Cr.M. & R. 311, 312, 313.

[9] (1873) L.R. 8 Q.B. 202.

[10] (1734) Cas.t.Hard. 85.

[11] (1779) 1 Doug.K.B. 251.

[12] (1780) Park on Marine Insurance, 8th ed., vol. I, pp. 506–507.

[13] (1848) 2 Ph. 801.

[14] [1929] 1 K.B. 470.

[15] [1931] A.C. 435, 439–440; 47 T.L.R. 319.

Ralli Brothers' case.[16] Lawrence L.J. based his decision on partnership.

As to this Indian regulation, no one would think that there was anything wrong in exporting jute or that it was malum in se. The distinction between malum in se and malum prohibitum may be difficult, but this clearly falls within the latter. It is also possible to draw a distinction on authority between foreign laws designed to regulate the internal economy of foreign countries and foreign laws intended to have effect outside the territory of the foreign country, a distinction between laws prohibiting imports and laws prohibiting exports. It is hard to enforce export control without claiming some extraterritorial validity for the law enacting it. But in the case of a prohibition of imports it is clear that the goods are to be dealt with in the foreign country, and such a law raises no difficulties about extraterritoriality.

If it is not distinguishable, *Foster* v. *Driscoll*[17] is wrong as being contrary to *Boucher* v. *Lawson*[18] and *Sharp* v. *Taylor.*[19] It stands on its own and is unsupported by any other authority. Even if it be treated as a case of malum prohibitum, the cases relating to foreign revenue laws still retain their pristine force: see *Holman* v. *Johnson.*[20] The courts cannot invent new heads of public policy to meet new situations. In *Foster* v. *Driscoll*[21] the court was wrong in relying on the principle of the comity of nations. Before one can apply the principle of public policy based on the comity of nations one must see what in fact other nations do in the matter: see *Compania Naviera Vascongado* v. *S.S. Cristina.*[22] See also *Westgate* v. *Harris*[23] and *Harwood & Cooper* v. *Wilkinson.*[24] As to the attitude of foreign courts, see Wolff's Private International Law, 2nd ed., p. 175, para. (d). The courts of other European countries do not take the view indicated in *Foster* v. *Driscoll.*[25] There is no principle which requires the English courts to give effect to a foreign law beyond its proper field of application. The first guiding principle in contracts is that people must adhere to their contracts. If they contract in relation to a particular law, they must perform the contract in accordance with that law.

As to the fourth question, if the appellant is wrong on the others, the courts of England should still not give effect to

[16] [1920] 2 K.B. 287.
[17] [1929] 1 K.B. 470.
[18] Cas.t.Hard. 85.
[19] 2 Ph. 801.
[20] 1 Cowp. 341.
[21] [1929] 1 K.B. 470.
[22] [1938] A.C. 485, 497; 54 T.L.R. 512; [1938] 1 All E.R. 719.
[23] [1929] 4 D.L.R. 643.
[24] [1930] 2 D.L.R. 199, 205.
[25] [1929] 1 K.B. 470.

this Indian law, having regard to its character. Its offensive characteristics are (1) that it is itself contrary to international law because it is a hostile act directed against a friendly State, and (2) that it falls within the category of those laws to which the English courts will not have regard, penal laws, revenue laws and political laws: see Dicey's Conflict of Laws, 2nd ed., pp. 152, 155, 156. As to exchange control legislation, the law is correctly summarized in Dicey's Conflict of Laws, p. 750, r. 166: see also *Kahler* v. *Midland Bank Ltd.*[26] and *Zivnostenska Banka National Corporation* v. *Frankman.*[27] There is justification for the use in Dicey's Conflict of Laws, p. 122, r. 22, of the word "political" in enumerating "penal, revenue or political laws." They all relate to public law and the English courts will not take notice of or pay regard to foreign laws of a public character, as distinct from laws regulating the private rights and obligations of an individual: see *Emperor of Austria* v. *Day and Kossuth.*[28] Though the plaintiff there succeeded, he disclaimed bringing the action to enforce a political right, and it was on that basis that the case was dealt with: see also *Smith* v. *Marconnay.*[29] *Huntington* v. *Attrill*[30] shows that references to penal and revenue laws are illustrations of the class of public laws. *Government of India* v. *Taylor*[31] shows that laws which flow from sovereign authority are to be treated in a different way from laws regulating proprietary rights: see also *In the Estate of Maldonado, decd.*[32] As to the principle of neutrality, see *Ex parte Chavasse*[33] and *Janson* v. *Driefontein Consolidated Mines Ltd.*[34] There is no reason to apply to a contract a law which the parties have not chosen to apply to it: see *Kohn* v. *Schooner Renaissance.*[35]

In summary, the finding of the Court of Appeal that the appellant knew and intended that there would be a violation of Indian law is not justified as an inference to be drawn from the evidence. Indian law cannot affect someone who is not subject to the Indian jurisdiction. The question of an offence could not arise unless there was knowledge on the part of the Indian shipper of the destination of the goods. The case does not fall within that of *Ralli Brothers.*[36] *Foster* v. *Driscoll*[37] is

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[26] [1950] A.C. 24; 65 T.L.R. 663; [1949] 2 All E.R. 621.

[27] [1950] A.C. 57; [1949] 2 All E.R. 671.

[28] (1861) 3 De G.F. & J. 217, 232, 238, 241–242, 250, 251.

[29] (1796) Peake Add.C. 81.

[30] [1893] A.C. 150, 153, 157; 8 T.L.R. 341.

[31] [1955] A.C. 491, 503, 510, 511, 513–514; [1955] 1 All E.R. 292.

[32] [1954] P. 223, 239, 244–245; [1953] 2 All E.R. 1579

[33] (1865) 4 De G.J. & S. 655.

[34] [1902] A.C. 484; 18 T.L.R. 796.

[35] (1850) 5 Louisiana Rep. 25.

[36] [1920] 2 K.B. 287.

[37] [1929] 1 K.B. 470.

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distinguishable or, alternatively, it was wrongly decided; it stands on its own. Since the proper law of the contract is English, the English courts should not pay regard to Indian law.

E. J. Cohn following. It is necessary to delimit the rule in *Foster* v. *Driscoll.*[37] There is no exact parallel to it. It stands alone. It is not a rule of conflict of laws but of English municipal law. This distinction is not an academic or a theoretical question.

The English law of conflict of laws defines the cases where English law steps into the background in favour of foreign law. In regard to international contracts three tests are relevant to decide when this occurs: (1) the intention of the parties, which governs the proper law of the contract; (2) the lex loci contractus, and (3) the lex loci solutionis.

Here Indian law is neither the lex loci contractus nor the lex loci solutionis, because no part of the contract is to be performed in India. No act of performance is necessarily required to be performed in India by either of the parties. Someone had to do something in India, but it was not one of the parties. Indian law is brought into this matter by way of the rule of English municipal law that the English courts will not enforce a contract which violates public policy: Dicey's Conflict of Laws, 6th ed., p. 607; Cheshire's Private International Law, 5th ed., pp. 150, 155, 237. Like every other case where public policy comes into play, the rule in *Foster* v. *Driscoll*[37] is an exception to two overriding principles of the English law of contract: (1) that the parties have freedom to contract within the limits of English law, and (2) that a word given by way of contract stands: pacta sunt servanda. That is the context in which one must work, though there may be exceptions in cases of statutory prohibitions or contracts contrary to current views of morality.

Public policy is an unruly horse. Its operations must be defined and interpreted with the greatest care. It is by way of public policy that Indian law comes to be considered in this case at all. Not every violation of foreign law will bring the conception of public policy into operation. Public policy has a selective character. It looks both at the nature of the foreign law and at the nature of its violation. Reliance is not here placed on the case of *Ralli Brothers*[38] and other similar cases where the question of foreign law came in by the front door of conflict of laws and not by the back door of public policy, which does not open with the same ease. English public policy pays regard to

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[37] [1929] 1 K.B. 470.

[38] [1920] 2 K.B. 287.

English habit and is devised in the interests of the English. It cannot be transformed into an obligation to pay regard to the public policies of other nations in an unconditional respect for all foreign laws, e.g., a foreign law, in war or peace, directed as a hostile act against this country. Assume an agreement between two Swiss citizens during the last war submitted the contract to English law as its proper law; assume, further, that the contract could not have been performed without an infringement of the German trading with the enemy legislation (e.g., the delivery of an artillery observation instrument); it could not have been said that that contract could not be enforced by the English courts because it violated German law.

Or assume a foreign law directed, not openly against England, but against an English colony with a view to damaging England (e.g., a law boycotting Aden). No English court would hold that public policy made it incumbent to pay regard to that law. It is self-evident that the public policy of England does not require the application of a law directed to harm the interests of this country. But English public policy is not intended merely to safeguard English national interests; other interests have also had a part in shaping it.

Public policy operating, as it does, as an exception to the principles that pacta sunt servanda and that contracts are free, the court must carefully weigh whether a foreign law is of such a character as to justify not keeping a man to his word and restraining freedom of contract. But foreign laws intended to harm a foreign and friendly nation are not of that character, since it is not in accordance with English public policy that a foreign and friendly nation should be harmed.

The rule in *Foster* v. *Driscoll*[39] does not merely mean that the court will not act to enforce a particular contract; it means that the court will not act, although, by virtue of its own rules, it would act but for the foreign law. That is a positive act, i.e., closing doors which are usually open, and our courts are not required by English public policy so to act as to inflict harm on a foreign and friendly nation. There may be cases where our courts would have regard to a foreign law which inflicted such harm (e.g., where the contract sought to be enforced provided for forging documents in order to circumvent it), but that would not be because of the nature of the law but because of the nature of its violation.

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[39] [1929] 1 K.B. 470.

Foreign laws which do not come within the purview of public policy in this connexion are (1) laws directed against English national interests; (2) laws directed against the interests of a colony or dominion; (3) laws of a wholly trivial character, and (4) laws instituted to set in motion acts against a foreign and friendly nation. Withdrawal of diplomatic agents and suspension of commercial intercourse are recognized as being "non-"amicable": see Oppenheim's International Law, 7th ed., vol. II, p. 133, para. 28. See also pp. 813–814, para. 398, for authority on how a nation should act, during a war between two foreign and friendly nations, in the matter of freedom of commerce. There is no distinction between freedom of commerce and freedom of contract. It is lawful for neutrals to carry goods from one country to another although these are at war with each other: see *The Helen*.[40] Blockade means that imports into one foreign country are illegal by reason of the laws of another foreign country. Yet contracts to break a blockade are not illegal, not because of the extraterritorial character of the blockade law but on account of the overriding principle of freedom of contract and commerce. Further, strict impartiality must be observed as between warring nations. From the point of view of a neutral there is no essential difference between a dispute settled by "hot" war and one settled by "cold" war; he may trade in disregard of either. Blockade and trade prohibition both depend on the law of the country imposing them. Blockade is a rule of law as well as of force, as witness the legislation in England during the late war restricting exports and imports. As to neutral trade with warring nations, see *The Rannveig*.[41]

Where public policy is concerned lawyers are allowed to look behind the law at reality to see whether morality or national interest is at stake. As a rule the mere existence of a law is enough for the lawyers to respect it, but when public policy is in question they look at motives and consequences. The selective principle of public policy excludes a law which is not conformable to the usage of nations. English public policy requires nations to act in conformity with the usage of nations and not against it: see *Wolff* v. *Oxholm*.[42] In the dispute between India and South Africa the decision was given against India by the United Nations: see Goodrich and Hambro's Charter of the United Nations, 2nd ed., pp. 159 et seq. India

[40] (1865) L.R. 1 A. & E. 1.

[41] [1922] 1 A.C. 97; 38 T.L.R. 120.

[42] (1817) 6 M. & S. 92.

had used the lawful means available to her under international law to obtain satisfaction for the treatment of Indians in South Africa, but had failed, and every step which she took subsequently was not justified in international law as not being in conformity with the law of nations. The Indian law in question was harmful to a foreign and friendly State. Freedom of commerce is still a fundamental principle of international law. Every deviation from it requires justification, and here there is no justification.

Passing to another aspect of the matter, public policy does not require a court in England to apply against an English contract a foreign law which is not applied by the courts of other trading countries. If an English court is to defeat an English contract on the ground of a foreign law which is not the lex loci contractus or the lex loci solutionis, it must be shown that foreign courts would do the same. English public policy will not subject English traders to restrictions to which other traders are not subject, save when morality or English public interest requires it: see Wolff's Private International Law, 2nd ed., p. 175. The respondents must show that the courts of other trading nations would have regard to the law here in question, because otherwise it would amount to discriminating against English traders in relation to the traders of other foreign nations. It might have been said, 50 or even 10 years ago, that the disregard of foreign law practised in the eighteenth century was no longer applicable because in the nineteenth and twentieth centuries there was more conformity to the usage of nations. But the last 10 years, and especially the last three years, have seen a fresh practice, and the same robust attitude exemplified in *Boucher* v. *Lawson*[43] should now be adopted towards export prohibitions by foreign countries. This case cannot be disregarded on the ground of the passing of 200 years. The situations then and today must be compared.

The comity of nations plays little part in the matter now being considered. It only operates as a key to the door of public policy. It is not a recognized branch of public international law. It is merely a general habit observed by our own courts and those of other nations. It is not a matter of law but of fact, and he who relies on facts must prove them: see Oppenheim's International Law, 8th ed., vol. I, pp. 33 et seq., para. 19c. There is, however, one similarity between the rules of comity of nations and international law: no less stringent proof is required of the existence of comity than of the content of international law: see *West Rand Central Gold Mining Co. Ltd.* v. *Rex.*[44] But here the courts below assumed the existence of a comity of nations requiring them to invoke public policy to defeat this claim. The English courts have often made rash assumptions about the usage of nations. For instance, they have assumed that, by the usage of nations, judgments of the courts are enforced reciprocally by other nations, but this makes very strange reading for anyone who has ever tried to enforce an English judgment abroad.

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[43] Cas.t.Hard. 85.

Not every breach of every foreign law taints a contract with turpitude. Turpitude might follow from the intended behaviour of the parties, for instance, possibly if the parties agreed to forge documents, even for the purpose of releasing a slave from foreign slavery.

In *Foster* v. *Driscoll*[45] the contract was to supply United States citizens with liquor which, in the view of their responsible government, would undermine their health. That was clearly a different case, because there can be no possible turpitude in supplying citizens of South Africa with bags to pack their goods. If the aim, purpose and goal of a contract is unobjectionable, one is entitled to adopt a more lenient view of it in considering whether it is tainted with turpitude. In *Foster* v. *Driscoll*[45] the United States Government considered "rum-running" very grave and attached a heavy penalty to it. Here, though both parties knew that it was unlawful to export jute from India to South Africa, the courts found no more than that; they did not find that the parties agreed to make a false statement; in fact the parties were intending to rely on finding an Indian shipper who would not ask too many questions. For all the appellant knew, the Indians might already have released the goods, which might be on the high seas. To hold a contract unenforceable on the ground of public policy one must find moral turpitude in both the parties.

As to the correct view of Indian laws on the relevant point, the courts below failed to observe the rules as to proof of foreign law: see *Buerger* v. *New York Life Assurance Co.*[46] and *A/S Tallinna Laevauhisus* v. *Estonian State Steamship Line.*[47] Here the courts below were not entitled to deviate from the evidence on Indian law unless it was absurd or inconsistent. Law is a question of social, historical and economic background as well as legal doctrines. If the Indian shipper had intended the goods for South Africa, or if the Chief Customs Officer was satisfied that they were for South Africa, then the export would have been unlawful in Indian law, but not otherwise. The Indian legislation only made export unlawful if certain conditions were fulfilled. On the evidence, there was a loophole in the law, which was not as sweeping as the courts below thought. One is not entitled to ask whether or not the loophole was intended. The appellant so arranged his affairs that he did not come within the words of the legislation.

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[44] [1905] 2 K.B. 391, 401, 406–407; 21 T.L.R. 562.

[45] [1929] 1 K.B. 470.

[46] (1927) 96 L.J.K.B. 930, 940–941; 43 T.L.R. 601.

[47] (1947) 80 Ll.L.Rep. 90, 107.

The judgment appealed from would have an adverse effect on English international trade. For instance, an English trader might buy goods from a French trader, knowing that they were from the United States and were ultimately for China. United States law prohibits export to China, but English law does not. The question would arise whether that prohibition would bar an action by the purchaser if the goods were not delivered.

[VISCOUNT SIMONDS said that the respondents' case might be argued on the footing that both parties to the contract were aware that it necessarily involved a breach of Indian law.]

A. A. Mocatta Q.C., *Richard Vick* and *Peter Kenworthy-Browne* for the respondent company. This case falls within *Foster* v. *Driscoll*[48] and therefore the contract is unenforceable in the English courts. The nature of the Indian law is irrelevant; it is its existence that matters. The Indian law here in question was not a penal law, a revenue law or a confiscatory law. As to political laws, the cases cited have no application to them unless they are of a penal, revenue or confiscatory nature. *Foster* v. *Driscoll*[48] cannot be distinguished. In that case Scrutton L.J. only dissented because he took a different view of the evidence.[49] The reasoning of Lawrence and Sankey L.JJ. is sound[50] and the judgment of the former cannot be distinguished on the ground that he based his decision on the law of partnership. See also *De Wütz* v. *Hendricks*.[51] *Foster* v. *Driscoll*[52] cannot be distinguished on the ground of any distinction between exports and imports. It was rightly decided. *Carling Export Brewing and Malting Co. Ltd.* v. *Rex*[53] was decided on a different point. No textbook has suggested that *Foster* v. *Driscoll*[54] was wrongly decided; on the contrary, the textbooks cite it with approval: Dicey's Conflict of Laws, 6th ed., p. 607; Cheshire's Private International Law, 5th ed., pp. 155, 237, and Wolff's Private International Law, 2nd ed., pp. 175, 182. *Holman* v. *Johnson*[55] is distinguishable, because the present case is not one of a revenue law. Further, the contract was complete in that case before the commission of any illegality. *Biggs* v. *Lawrence*[56] does not help the appellant, because there the action failed. It was not inconsistent with *Foster* v. *Driscoll.*[57] *Hodgson* v. *Temple*[58] was a very special case. *Pellecat* v. *Angell*[59] was a case like *Holman* v. *Johnson.*[60] It is not good law now to encourage the smuggling trade; if it were, it would be a blot on our jurisprudence. As to the scope of such cases as *Smith* v. *Marconnay*[61] and *Boucher* v. *Lawson,*[62] see Wolff's Private International Law, 2nd ed., p. 258. If one had to choose between these cases and *Foster* v. *Driscoll,*[63] one should choose the latter. *Planché* v. *Fletcher*[64] and *Lever* v. *Fletcher*[65] are distinguishable because this is not a case of a revenue law. In any event it is doubtful whether such cases would now be followed: see Arnould on Marine Insurance, 13th ed., vol. II, pp. 670–672, paras. 741–743, and Halsbury's Laws of England, 3rd ed., vol. VII, p. 80, para. 148. *Sharp* v. *Taylor*[66] is a case similar to *Boucher* v. *Lawson.*[67] *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.*[68] is not much help on the present problem, since it was very different on its facts. *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industric Aktiengesellschaft*[69] was also very far removed from the present case. In that case *Foster* v. *Driscoll*[70] was not cited. The case of *Ralli Brothers*[71] was cited, approved and distinguished. On this point see du Parcq L.J.[72] *Foster* v. *Driscoll*[73] is not inconsistent with the earlier or the later authorities and should be approved. It can be based either on public policy or on the principle ex turpi causa non oritur actio. See also the *Ralli Brothers* case.[74]

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[48] [1929] 1 K.B. 470.

[49] Ibid. 484, 496.

[50] Ibid. 509–510, 510, 512–513, 514, 514–515.

[51] (1824) 2 Bing. 314.

[52] [1929] 1 K.B. 470.

[53] [1931] A.C. 435.

[54] [1929] 1 K.B. 470.

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[55] 1 Cowp. 341.
[56] 3 Term Rep. 454.
[57] [1929] 1 K.B. 470.
[58] 5 Taunt. 181.
[59] 2 Cr.M. & R. 311.
[60] 1 Cowp. 341.
[61] Peake Add.C. 81.
[62] Cas.t.Hard. 85.
[63] [1929] 1 K.B. 470.
[64] 1 Doug.K.B. 251.
[65] Park on Marine Insurance, 8th ed., vol. I, pp. 506–507.
[66] 2 Ph. 801.
[67] Cas.t.Hard. 85.
[68] [1939] A.C. 277.
[69] [1939] 2 K.B. 678.
[70] [1929] 1 K.B. 470.
[71] [1920] 2 K.B. 287.
[72] [1939] 2 K.B. 678, 699.
[73] [1929] 1 K.B. 470.
[74] [1920] 2 K.B. 287, 303–304.

The position of English courts in regard to foreign laws is one of neutrality. They will not give damages for failure to perform a contract contrary to the law of India: see Law Quarterly Review (1957), vol. LXXIII, p. 35, and *Aksionairnoye Obschestvo Dlia Mechanicheskoyi Obrabotky Diereva* (1) *A. M. Luther* v. *James Sagor & Co.*[75] There is no authority for saying that the Indian law now in question is a breach of public international law by India.

Huntington v. *Attrill* [76] is helpful to the respondents. Coupled with *Government of India* v. *Taylor*,[77] it is enough to dispose of the appellant's argument based on Dicey's Conflict of Laws, 2nd ed., p. 152. *In the Estate of Maldonado, decd.*[78] is very little help here. *Emperor of Austria* v. *Day and Kossuth* [79] is distinguishable from the present case, as regards the dicta relied on by the appellant. In the result the plaintiff did succeed. *Wolff* v. *Oxholm* [80] does not help in this case. There is nothing to show that this Indian law was contrary to the usage of nations.

There has been no case where the failure for which damages was sought was a failure to do in a foreign country something which was illegal in that foreign country. Damages would not be given in such circumstances, even when the proper law of the contract was English. The correct view was stated in the Court of Appeal in the present case [81] by Denning and Parker L.JJ. The court was right in applying *Foster* v. *Driscoll*.[82]

Neil Lawson Q.C. in reply. In cases such as *Ralli's* case [83] one must consider the validity of the contractual act at the time it is to be performed. Here one must consider the intention of the parties. In *Foster* v. *Driscoll* [84] the fundamental basis of the contract was the actual participation by the parties in acts illegal in the United States. But knowledge and intention are not the same as actual participation in an illegal act. The present case is distinguishable because active participation in acts illegal by Indian law is required of neither party to the contract. As to invalidity of contracts, see Dicey's Conflict of Laws, 6th ed., pp. 637, 641 et seq., and Schmitthoff's English Conflict of Laws, 3rd ed., p. 133.

[75] [1921] 3 K.B. 532, 557–559; 37 T.L.R. 777.

[76] [1893] A.C. 150, 157.

[77] [1955] A.C. 491.

[78] [1954] P. 223.

[79] 3 De G.F. & J. 217.

[80] 6 M. & S. 92.

[81] [1956] 2 Q.B. 490, 515–516, 524.

[82] [1929] 1 K.B. 470.

[83] [1920] 2 K.B. 287.

[84] [1929] 1 K.B. 470, 496–498, 501, 509, 510, 514, 518, 520.

As to the comity of nations, see *Foster* v. *Driscoll.*[85] There is no authority or principle which requires English courts to give recognition to foreign laws in relation to transactions not governed in whole or in part by the foreign law. In such a case as this it is wrong to inquire whether the contract might give rise to complaint by a foreign State. If it were right to do so, that would bring in not only foreign law but also the hypothetical interests of the foreign State. The comity of nations is a vague and tenuous idea. As to the recognition of the laws of foreign States, see *Kleinwort's* case,[86] *per* du Parcq L.J. The only circumstances in which English courts will have regard to the law of a foreign State is where it is the proper law of the contract or where the place of performance is within the territory of that foreign country. If the comity of nations provided a successful defence here, it should have provided a successful defence in *Trinidad Shipping and Trading Co. Ltd.* v. *G. E. Alston & Co.*[87] Reliance is placed on *In re Claim by Helbert Wagg & Co. Ltd.*[88] The comity of nations does not require the English courts to refuse to enforce such a contract as this.

Foster v. *Driscoll* [89] can be properly supported on the application of *Ralli's* case,[90] but if it is sought to go beyond that and apply the principles of public policy and the comity of nations, it is contrary to authority. If questions of public policy are involved, the courts should look at the nature of the foreign law to which it is suggested regard must be paid. But the Indian law here relied on is a hostile act against a foreign and friendly State, and public policy does not lead the English courts to support the legislating country in such a case against the country which is the object of the discriminatory legislation. The old cases, *Boucher* v. *Lawson,*[91] *Sharp* v. *Taylor* [92] and *Planché* v. *Fletcher,*[93] are still valid. When the proper law of the contract is English law, nothing but English public policy prevents the contract from being enforced.

Their Lordships took time for consideration.

October 21. VISCOUNT SIMONDS stated the claim and the defence and the Indian legislation and continued: My Lords,

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[85] [1929] 1 K.B. 470, 510, 518.

[86] [1939] 2 K.B. 678, 699.

[87] [1920] A.C. 888; 36 T.L.R. 654.

[88] [1956] Ch. 323, 351–352; sub nom. *Re Helbert Wagg & Co. Ltd.* [1956] 1 All E.R. 129.

[89] [1929] 1 K.B. 470.

[90] [1920] 2 K.B. 287.

[91] Cas.t.Hard. 85.

[92] 2 Ph. 801.

[93] 1 Doug.K.B. 251.

H. L. (E.)
1957
Regazzoni v. K. C. Sethia (1944) Ltd.
Viscount Simonds.

I do not think it necessary to state at length the facts of the case. They have been found by Sellers J. and his findings were accepted by the Court of Appeal. No other conclusion was, in my opinion, possible than that (in the words of the learned judge)[1] "both parties . . . contemplated and intended that "the contract goods would be shipped from India and be made "available in Genoa so that the plaintiff might make a resale "or fulfil a bargain of resale to the South African buying "agency." Nor is it to be doubted that both parties were well aware of the restrictions imposed by the order of July 17, 1946. A strenuous attempt was made to persuade your Lordships that the contract did not infringe Indian law, and this was vouched by a Mr. Nissim, whose qualification to give expert evidence was not challenged. But I must say, with all respect to him, that I find his testimony confused and unconvincing. It may well be that an Indian shipper would not be subject to any penalty if he could prove that he was unaware of the ultimate destination of the goods. But it is not possible for parties whose common intention it is to procure the shipment of goods from India directly or indirectly to the Union of South Africa to plead the innocence of the transaction on the ground that the Indian shipper may be deceived or even that the Chief Customs Officer may be satisfied (contrary to the fact) that the ultimate destination is not the Union of South Africa. On the contrary, it must be assumed that the Chief Customs Officer would not be so satisfied: if so, the shipment inevitably falls within the prohibition and could only be carried out in violation of Indian law.

The question then arises—and it is, as I say, the only question for your Lordships' consideration—whether the respondents were justified in repudiating the contract. They claim to be justified on the ground that I have already stated. Their broad proposition is that whether or not the proper law of the contract is English law, an English court will not enforce a contract, or award damages for its breach, if its performance will involve the doing of an act in a foreign and friendly State which violates the law of that State. For this they cite the authority of the well-known case of *Foster* v. *Driscoll*,[2] and much of the debate in this House has been whether that case was rightly decided, and if so, whether it is distinguishable from the present case. The appellant contends that it was not rightly decided, and further invokes a familiar principle which he states in these wide but questionable terms, "An English "court will not have regard to a foreign law of a penal, revenue, "or political character," and claims that the Indian law here in question is of such a character.

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[1] [1956] 2 Q.B. 490, 498; [1956] 2 All E.R. 487.

[2] [1929] 1 K.B. 470; 45 T.L.R. 185.

My Lords, in the consideration of this matter I deem it of the utmost importance to bear in mind that we are not here concerned with a suit by a foreign State to enforce its laws. The recent case in this House of *Government of India* v. *Taylor*[3] shows beyond all doubt that an English court will not enforce the penal or revenue laws of another country at the suit of that country. That proposition was there exhaustively examined and nothing remains to be said about it except that there is still a question how far, if at all, the doctrine extends to laws which are described as having a "political" or "public" character. It is clear at least, as Denning L.J. said in this case, that[4] "these courts do not sit to collect taxes for another country or "to inflict punishments for it." But, as I say, we are not concerned with such a case, but with a very different question, viz., whether in a suit between private persons the court will enforce a contract which involves the doing in a foreign country of an act which is illegal by, and violates, the law of that country. When I say "foreign country" I mean a foreign and friendly country and will not repeat the phrase. In the statement of the question I call particular attention to the words "the doing in a "foreign country," for it may well be that different considerations will arise and a different conclusion will be reached if the law of the contract is English and the contract can be wholly performed in England, or at least in some other country than that whose law makes the act illegal (see *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft*[5]). There are points at which the two questions appear to touch each other, and sometimes the one proposition has been treated as an exception on the other. But there is, I think, a fundamental difference. It can hardly be regarded as a matter of comity that the courts of this country will not entertain a suit by a foreign State to enforce its revenue laws. It is, on the other hand, nothing else than comity which has influenced our courts to refuse as a matter of public policy to enforce, or to award damages for the breach of, a contract which involves the violation of foreign law on foreign soil, and it is the limits of this principle that we have to examine. If the principle is, as I think it clearly is, based on public policy, your Lordships will not hesitate, while disclaiming any intention to create any new head of public policy, to apply an old principle to new circumstances.

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[3] [1955] A.C. 491; [1955] 1 All E.R. 292.

[4] [1956] 2 Q.B. 490, 515; [1956] 2 All E.R. 487.

[5] [1939] 2 K.B. 678; 55 T.L.R. 814; [1939] 3 All E.R. 38.

It will be observed that I have said that the appellant's contention is that the English courts will not pay regard to the penal, revenue, or political laws of a foreign State, not merely that they will not enforce such laws at the suit of a foreign State. If he is right, then *Foster* v. *Driscoll*[6] was wrongly decided and nothing stands in the way of the success of this appeal except the counter argument that the Indian law with which we are concerned does not fall within this category.

But before examining the cases in which the question has been the enforcement of a contract involving the violation of a foreign law, it is perhaps desirable to refer to the analogous cases in which contracts involving the violation of English law have been considered. I say " analogous cases " because here, too, public policy is involved. Whether the illegality be robbery on Hounslow Heath or smuggling goods into England contrary to our law (see *Biggs* v. *Lawrence*[7]) or the hiring of a brougham to a prostitute for the purpose of her trade, a party cannot recover in a court of justice on a contract so tainted. Here the only question will be whether the party suing is to be regarded as a sharer in the transaction (see, for example, *Hodgson* v. *Temple*[8]), and refinements have been introduced into this branch of the law which may one day merit examination.

Just as public policy avoids contracts which offend against our own law, so it will avoid at least some contracts which violate the laws of a foreign State, and it will do so because public policy demands that deference to international comity. The question is what contracts? " It occurred to me at the trial that it was " contrary to the law of nations," said Best C.J. in *De Wütz* v. *Hendricks*[9] " . . . for persons in *England* to enter into engage- " ments to raise money to support the subjects of a Government " in amity with our own, in hostilities against their Government, " and that no right of action could arise out of such a trans- " action." More than a hundred years later in *De Beéche* v. *South American Stores* (*Gath & Chaves*) *Ltd.*[10] it was said in this House: " It cannot be controverted that the law of this

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[6] [1929] 1 K.B. 470.

[7] (1789) 3 Term Rep. 454.

[8] (1813) 5 Taunt. 181.

[9] (1824) 2 Bing. 314, 315–316.

[10] [1935] A.C. 148, 156; 51 T.L.R. 189.

"country will not compel the fulfilment of an obligation whose "performance involves the doing in a foreign country of something which the supervenient law of that country has rendered "it illegal to do." I make two observations upon this citation; first, the case is a fortiori if the illegality is not supervenient but, as in the case under appeal, existent and known at the time of the contract; secondly—and I say this in deference to an argument that was vigorously addressed to us—it would, as Scrutton L.J. said in *Aksionairnoye Obschestvo Dlia Mechanicheskoyi Obrabotky Diereva (1) A. M. Luther* v. *James Sagor & Co.*,[11] "be a serious breach of international comity, if a "State is recognized as a sovereign independent State, to postulate "that its legislation is 'contrary to essential principles of justice "'and morality.'" Your Lordships were in effect invited to say that the relevant Indian legislation was of such a character. I can only say that there could be no possible justification for such a view, however hardly the Act may bear on the Union of South Africa.

It is time, then, to turn to those cases in which an exception has been made to the principle thus authoritatively stated. In doing so I repeat that, the principle being based on public policy, exceptions to it must be similarly based. It would, therefore, not be surprising if a contract, in one age, falls within the proposition, in another, without it. This observation has particular relevance to the first case that I shall cite. In *Boucher* v. *Lawson*,[12] the trade of exporting gold from Portugal being prohibited by the law of that country, Lord Hardwicke, then Lord Chief Justice, nevertheless upheld a contract which involved the violation of that law, observing that "if it should "be laid down, that because goods are prohibited to be "exported by the laws of any foreign country from whence they "are brought, therefore the parties should have no remedy or "action here, it would cut off all benefit of such trade from this "kingdom, which would be of very bad consequence to the "principal and most beneficial branches of our trade; nor does it "ever seem to have been admitted." I must admit to some doubt whether, if this case had come before the court two hundred years later, so robust an assertion in favour of national interest to the prejudice of international comity would have been made. But, at any rate, in what might be regarded as purely revenue laws the same idea persisted. Thus, in *Pellecat* v.

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[11] [1921] 3 K.B. 532, 558–559; 37 T.L.R. 777.

[12] (1734) Cas.t.Hard. 85, 89.

Angell,[13] where it was held that a foreigner, selling and delivering goods abroad to a British subject and knowing at the time of sale and delivery that the purchaser intended to smuggle them into England, was not debarred from recovering the price of the goods, it was said by Lord Abinger that it would be "most "unfortunate if it were so in this country, where, for many "years, a most extensive foreign trade was carried on directly "in contravention of the fiscal laws of several other States." The smuggling was in this case a breach of English law but it illustrates the view that was then entertained.

So, too, in *Emperor of Austria* v. *Day and Kossuth*,[14] Lord Campbell L.C., after what may be regarded as a valuable exposition of the general principle, said: "A more specious "objection was rested on the class of cases in which it has been "held that we take no notice of the 'revenue laws' of foreign "countries, so that an injunction would certainly be refused to "a foreign Sovereign who should apply for one to prevent the "smuggling of English manufactures into his dominions to the "grievous loss of his fisc. But, although from the comity of "nations, the rule has been to pay respect to the laws of foreign "countries, yet, for the general benefit of free trade, 'revenue "'laws' have always been made the exception; and this may be "an example of an exception proving the rule." In the case before him the Lord Chancellor was dealing with a claim by the foreign Sovereign himself, and in the earlier part of the passage that I have cited refers specifically to such a claim, but in the latter part his language is more comprehensive and clearly refers to the cases that I have cited, and particularly also to *Holman* v. *Johnson*,[15] and the observation of Lord Mansfield C.J. often repeated and often criticized: "No country ever takes notice of "the revenue laws of another." One more example I will give because it was much relied on by counsel for the appellant. In *Sharp* v. *Taylor*[16] Lord Cottenham L.C. said that the courts of this country will not "refuse to administer justice between joint "importers of any article of commerce upon proof that, in the "production or exportation of such article, some fiscal law of "the country of produce has been violated."

Here, my Lords, was a formidable line of authority when in 1920 *Ralli Brothers* v. *Compañia Naviera Sota y Aznar*[17] came before the Court of Appeal. In that case the contract in suit was governed by English law but it required the performance in Spain of an act illegal by Spanish law, and it was held that for that reason it could not be enforced. I will cite one passage only from the judgment of Scrutton L.J. "Where," he said,[18] "a contract requires an act to be done "in a foreign country, it is, in the absence of very special "circumstances, an implied term of the continuing validity of "such a provision that the act to be done in the foreign country "shall not be illegal by the law of that country. This country "should not in my opinion assist or sanction the breach of the "laws of other independent States." In the *Ralli Brothers* case[19] the relevant law was not a revenue law, and I am content to assume that Scrutton L.J. might have qualified his statement if he had had such a law in mind. But I venture to return to what I said earlier in this opinion. It does not follow from the fact that today the court will not enforce a revenue law at the suit of a foreign State that today it will enforce a contract which requires the doing of an act in a foreign country which violates the revenue law of that country. The two things are not complementary or co-extensive. This may be seen if for revenue law penal law is substituted. For an English court will not enforce a penal law at the suit of a foreign State, yet it would be surprising if it would enforce a contract which required the commission of a crime in that State. It is sufficient, however, for the purposes of the present appeal to say that, whether or not an exception must still be made in regard to the breach of a revenue law in deference to old authority, there is no ground for making an exception in regard to any other law. I should myself have said—and this is, I think, the only point upon which I do not agree with the Court of Appeal—that the present case was precisely covered by the decision in *Ralli Brothers*.[19] For when the fact is found that the very thing which the parties intended to do was to export the jute bags from India in order that they might go via Genoa to the Union of South Africa, it appears to me irrelevant that upon the face of the documents that wrongful intention was not disclosed. But, whether this is so or not, it is clearly covered by *Foster* v. *Driscoll*,[20] a decision the correctness of which is not to be doubted. The distinctive feature of the case was that Scrutton L.J. thought that the contract there in question could be carried out legally, and for that reason, differing from Lawrence and Sankey L.JJ., held that it was not invalid. The principle of the decision in *Ralli Brothers*[21] was emphatically reasserted and the apparent innocence of the documents was disregarded, the guilty intention being proved ab extra. So, here, it has been conclusively found that the common intention of the parties was to violate the law of India, and it is of no consequence that the documents did not disclose their intention. I ought not to part from the case without noting that Sankey L.J. observed that the cases relating to the breach of a revenue law were not germane to the issue. Nor are they germane to this appeal. Whether they are still to be regarded as a binding authority is a question that must await determination.

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[13] (1835) 2 Cr.M. & R. 311, 313.

[14] (1861) 3 De G.F. & J. 217, 241–242.

[15] (1775) 1 Cowp. 341, 343.

[16] (1848) 2 Ph. 801, 816.

[17] [1920] 2 K.B. 287; sub nom. *Sota and Aznar* v. *Ralli Brothers*, 36 T.L.R. 456.

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[18] [1920] 2 K.B. 287, 304.
[19] [1920] 2 K.B. 287.
[20] [1929] 1 K.B. 470.

The appeal should, in my opinion, be dismissed with costs.

Lord Reid. My Lords, in September, 1948, a contract was made under which the respondents agreed to sell to the appellant 500,000 B twills (a kind of jute bag) to be shipped September or October c.i.f. Genoa at a price of 248 shillings per hundred. The appellant now sues for damages for breach of contract. Admittedly the proper law of the contract is English law. The respondents' defence is that the contract is unenforceable because of the facts known to both parties and their intentions when the contract was made. I shall not detain your Lordships by examining the evidence because I agree with what my noble and learned friend, Lord Simonds, has said about it.

[His Lordship stated the facts and continued:] To my mind, the question whether this contract is enforceable by English courts is not, properly speaking, a question of international law. The real question is one of public policy in English law: but in considering this question we must have in mind the background of international law and international relationships often referred to as the comity of nations. This is not a case of a contract being made in good faith but one party thereafter finding that he cannot perform his part of the contract without committing a breach of foreign law in the territory of the foreign country. If this contract is held to be unenforceable, it should, in my opinion, be because from the beginning the contract was tainted so that the courts of this country will not assist either party to enforce it.

I do not wish to express any opinion about a case where parties agree to deal with goods which they both know have already been smuggled out of a foreign country, or about a case where the seller knows that the buyer intends to use the goods for an illegal purpose or to smuggle them into a foreign country. Such cases may raise difficult questions. The crucial fact in this case appears to me to be that both parties knew that the contract could not be performed without the respondents procuring a breach of the law of India within the territory of that country.

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[21] [1920] 2 K.B. 287.

On that question I do not get very much assistance from the older cases. Most of them do not deal with that point and, further, it must, I think, be borne in mind that they date from a time when international relationships were somewhat different and when theories of political economy now outmoded were generally accepted. Many dealt with revenue laws or penal laws, which have always been regarded as being in a special position, and I do not wish on this occasion to say more than that probably some re-examination of some of these cases may in future be necessary. The Indian law prohibiting exports to South Africa does not appear to me to be a revenue or penal law any more than was the law of exchange control considered by this House in *Kahler* v. *Midland Bank Ltd.*[22]

Further, this case does not, in my view, involve the enforcement of Indian law in England. In fact, no breach of Indian law in the execution of this contract was ever committed or attempted because the contract came to an end by its repudiation by the respondents within a few days after it was made.

The only recent authority which is directly in point is *Foster* v. *Driscoll.*[23] There Scrutton L.J. dissented because he took a different view of the facts: if he had held that performance of the contract necessarily involved a breach of American law, I think that he would have agreed with the majority. He said [24]: "I "have no doubt that if seller and buyer agreed to ship the "whisky into the United States contrary to the laws of that "country the contract would not be enforced here: *Ralli's* case,[25] "not because it was illegal here but as a matter of public policy "based on international comity." He then cited with approval [26] Dicey's Conflict of Laws, 4th ed., p. 620: "'It must, however, "'be noted that if a contract is an English contract, it will only "'be held invalid on account of illegality if it actually necessitates "'the performance in a foreign and friendly country of some act "'which is illegal by the law of such country.'" And he also quoted with approval a passage from the judgment of Blackburn J. in *Waugh* v. *Morris*[27]: "We quite agree, that, where a con-"tract is to do a thing which cannot be performed without a "violation of the law it is void, whether the parties knew the law "or not. But we think, that to avoid a contract which can be "legally performed, on the ground that there was an intention "to perform it in an illegal manner, it is necessary to show that "there was the wicked intention to break the law; and, if this be "so, the knowledge of what the law is becomes of great import-"ance." By "a thing which cannot be performed without a "violation of the law," I think that Blackburn J. meant a thing which the contract expressly or by clear implication requires to be done. This contract does not require the seller to obtain the goods from India: it is only after investigation of the facts that it appears that he could not have got them anywhere else. And this contract does not disclose the buyer's intention to send the goods to South Africa. On the face of it this contract could be performed without a breach of the laws of any country. I shall also quote from what Lawrence L.J. said in *Foster's* case[28]: "On principle, however, I am clearly of opinion that a partner-"ship formed for the main purpose of deriving profit from the "commission of a criminal offence in a foreign and friendly "country is illegal, even although the parties have not succeeded "in carrying out their enterprise, and no such criminal offence "has in fact been committed; and none the less so because the "parties may have contemplated that if they could not success-"fully arrange to commit the offence themselves they would "instigate or aid and abet some other person to commit it." These passages cover the present case, and I agree with them.

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[22] [1950] A.C. 24; 65 T.L.R. 663; [1949] 2 All E.R. 621.

[23] [1929] 1 K.B. 470.

[24] Ibid. 496.

[25] [1920] 2 K.B. 287.

[26] [1929] 1 K.B. 470, 497.

Finally, it was argued that, even if there be a general rule that our courts will take notice of foreign laws so that agreements to break them are unenforceable, that rule must be subject to exceptions and this Indian law is one of which we ought not to take notice. It may be that there are exceptions. I can imagine a foreign law involving persecution of such a character that we would regard an agreement to break it as meritorious. But this Indian law is very far removed from anything of that kind. It was argued that this prohibition of exports to South Africa was a hostile act against a Commonwealth country with which we have close relations, that such a prohibition is contrary to international usage, and that we cannot recognize it without taking sides in the dispute between India and South Africa.

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[27] (1873) L.R. 8 Q.B. 202, 208.

[28] [1929] 1 K.B. 470, 510.

My Lords, it is quite impossible for a court in this country to set itself up as a judge of the rights and wrongs of a controversy between two friendly countries, we cannot judge the motives or the justifications of governments of other countries in these matters and, if we tried to do so, the consequences might seriously prejudice international relations. By recognizing this Indian law so that an agreement which involves a breach of that law within Indian territory is unenforceable we express no opinion whatever, either favourable or adverse, as to the policy which caused its enactment. In my judgment this appeal should be dismissed.

Lord Cohen. My Lords, I concur.

Lord Keith of Avonholm. My Lords, on the only question of fact in this case I agree that the contracting parties knew that the contract could only be carried out, and intended that it should be carried out in circumstances which, if all the facts were known to the Indian shipper, would be a violation of Indian law.

It is accepted that the proper law of the contract is English law, and the only other question is whether the contract is one which the English courts will enforce. I am clear that it is not. The case is within the ratio of the decision in *Foster* v. *Driscoll*,[29] and that case was, in my opinion, rightly decided. I would say a few words about *Foster* v. *Driscoll*.[29] In that case recourse was had to the courts in the form of three separate actions involving rights and liabilities inter se of the members of an English partnership or joint adventure. Owing to failure among the partners to achieve the objects of the joint adventure certain of the members brought actions to rescind the agreement and others actions to enforce liabilities incurred under their agreement, including certain bills of exchange drawn by some and accepted by others. The decision of the court was that the agreement constituted an illegal joint adventure, being designed to run whisky into the United States of America during a period of prohibition in that country. Lawrence L.J. stated the matter thus[30]: "On "principle, however, I am clearly of opinion that a partnership "formed for the main purpose of deriving profit from the com-"mission of a criminal offence in a foreign and friendly country "is illegal, even although the parties have not succeeded in "carrying out their enterprise, and no such criminal offence has "in fact been committed; and none the less so because the

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[29] [1929] 1 K.B. 470.

[30] Ibid. 510.

"parties may have contemplated that if they could not successfully arrange to commit the offence themselves they would "instigate or aid and abet some other person to commit it. The "ground upon which I rest my judgment that such a partnership "is illegal is that its recognition by our courts would furnish a "just cause for complaint by the United States Government "against our Government (of which the partners are subjects), "and would be contrary to our obligation of international comity "as now understood and recognized, and therefore would offend "against our notions of public morality."

In the result, the court refused to entertain the suits between the various partners and all the actions were dismissed. No point can be made of the fact that the decision related to an illegal partnership. It was necessary so to find because the court was concerned with disputes within the partnership. It was for that reason that Lindsay, for instance, one of the co-partners, endeavoured unsuccessfully to make out that his share in the transaction was merely as an independent seller of whisky in the ordinary course of trade to certain parties to the agreement, in which case other considerations might have arisen. If the contemplated object of the adventure had been achieved, and the partners had found themselves forced to sue the purchaser of the whisky for the price in the English courts, it would have been equally impossible for them to succeed against a plea of illegality, even assuming delivery had taken place on the high seas or somewhere outwith the territory of the United States.

In the present case I see no escape from the view that to recognize the contract between the appellant and the respondent as an enforceable contract would give a just cause for complaint by the Government of India and should be regarded as contrary to conceptions of international comity. On grounds of public policy, therefore, this is a contract which our courts ought not to recognize. It is said that the Indian legislation is discriminatory legislation against a country which is a member of the Commonwealth and with which this country is on friendly terms. But that, in my opinion, is irrelevant. The English courts cannot be called on to adjudicate upon political issues between India and South Africa. The Indian law is not a law repugnant to English conceptions of what may be regarded as within the ordinary field of legislation or administrative order even in this country. It is the illegality under the foreign law that is to be considered and not the effect of the foreign law on another country.

I have not found it necessary to refer to a number of cases which were much canvassed in the course of the hearing. Apart from those where there were clear violations of English law, as in *Biggs* v. *Lawrence*[31] and *De Wütz* v. *Hendricks*,[32] many of these cases would seem to fall broadly into two categories: (1) cases where a vendor knew or suspected that goods sold and delivered abroad were to be smuggled by the purchaser into England in breach of her customs laws (for example, *Holman* v. *Johnson*,[33] *Pellecat* v. *Angell*[34]); (2) cases where goods or moneys had been acquired and brought to this country in breach of some foreign law: *Boucher* v. *Lawson*[35]; *Sharp* v. *Taylor*.[36] I agree with the view entertained by some of your Lordships and by all the Lords Justices in the Court of Appeal that the proposition that "no country ever takes notice of the revenue laws of "another" is too widely expressed. It may require in some other case fuller examination and elucidation. It was but lightly touched on in the case of *Government of India* v. *Taylor*.[37] But it is not a proposition that can be invoked in the circumstances of this case. I would reserve my opinion whether, apart from any such supposed rule of law, some of these decisions may not be supported on the view that the transaction in question was unaffected by the illegality, either because in one category of case the transaction was finished and the vendor had no concern, or reason to be concerned, with the intentions of the purchaser, or because in the other category the illegality had been exhausted and new rights and liabilities had emerged which did not call for any recognition of the illegality.

I would dismiss the appeal.

LORD SOMERVELL OF HARROW. My Lords, a foreign State or prosecuting authority cannot in our courts enforce its criminal law. "Crimes, including in that term all breaches of public "law punishable by pecuniary mulct or otherwise, at the instance "of the State Government, or of someone representing the public, "are local in this sense, that they are only cognizable and "punishable in the country where they were committed": *Huntington* v. *Attrill*.[38] In the result there are treaties of extradition.

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[31] 3 Term Rep. 454.

[32] 2 Bing. 314.

[33] 1 Cowp. 341.

[34] 2 Cr.M. & R. 311.

[35] Cas.t.Hard. 85.

[36] 2 Ph. 801.

[37] [1955] A.C. 491; [1955] 1 All E.R. 292.

[38] [1893] A.C. 150, 156; 8 T.L.R. 341.

At the other end of the legal scale our courts, in a dispute between contracting parties, will enforce foreign law of contract if according to the applicable rules it is the proper law by which to determine the issues raised. The fact that the contract was made abroad and to be performed abroad does not affect the jurisdiction.

Although many revenue laws do not come within the words from *Attrill's* case [38] cited above, they are unenforceable in our courts: *Government of India* v. *Taylor*.[39]

The principles stated above do not in themselves solve or throw any real light on the present problem, which may be stated as follows: Will our courts enforce a contract if its performance involves a breach of foreign criminal or "public" law? If the answer is "No," one has to consider the degree of involvement that will produce unenforceability.

It seems to me impossible to suggest that our courts would enforce an agreement to commit in country A a crime such as murder, arson or burglary. Is there any justification for drawing a line between what are evils generally and acts prohibited by the foreign State, no doubt because they are regarded as local evils?

The statements in the old cases support the view that it is the illegality under the foreign law which is the test and one does not have to distinguish or attempt to distinguish between what is "wrong" from what is prohibited. In *Holman* v. *Johnson* [40] tea had been sold and delivered in Dunkirk, the seller knowing that the buyer intended to smuggle it into England. The proper law of the contract was the law of Dunkirk, and the illegality had to be considered in the first place under that law. Lord Mansfield, in considering this point, held that the contract was valid not on the ground that illegality under foreign law is never relevant but on the ground that no country ever takes notice of the *revenue* (my italics) laws of another country. He was clearly directing his mind to the law in force in Dunkirk, as the revenue law in question was the law of England. He implies that the law of one country would take notice of illegalities arising under the laws of another country other than revenue laws.

The principle appears clearly from a paragraph in Lord Campbell L.C.'s judgment in *Emperor of Austria* v. *Day and Kossuth* [41]: "A more specious objection was rested on the class "of cases in which it has been held that we take no notice of "the 'revenue laws' of foreign countries, so that an injunction

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[38] [1893] A.C. 150, 156.

[39] [1955] A.C. 491.

[40] 1 Cowp. 341.

[41] 3 De G.F. & J. 217, 241–242.

"would certainly be refused to a foreign sovereign who should "apply for one to prevent the smuggling of English manufactures "into his dominions to the loss of his *fisc*. But, although "from the comity of nations, the rule has been to pay respect to "the laws of foreign countries, yet, for the general benefit of "free trade, 'revenue laws' have always been made the exception; and this may be an example of an exception proving "the rule." That is the principle rightly applied in *Foster* v. *Driscoll*.[42] It is a principle of our municipal law. Its aim is no doubt to preserve comity with other friendly States, but it is in no sense dependent on proof of universality or reciprocity.

In the present case, for reasons which have been stated by your Lordships, the performance of the contract to the knowledge and intention of both parties involved a breach of Indian law. Prima facie that is sufficient to make it unenforceable in our courts. Your Lordships were invited to make an exception to the principle on the ground that the law in question was directed against the Union of South Africa arising out of a dispute between the two States. I do not think this would justify taking the case out of the rule.

The statement that in this field one country takes no notice of the revenue laws of another seems to have been based on the principle that smuggling and freedom "gang thegither" and had its high water mark in *Boucher* v. *Lawson*.[43] Scrutton L.J., in *Ralli Brothers* v. *Compañia Naviera Sota y Aznar*,[44] reserved the issue for consideration should it arise. It was submitted that the prohibition in the present case of export to a particular destination was a revenue law, and one can imagine such a prohibition being a revenue law. On the evidence in the present case it would seem not to fall within the ordinary meaning of the phrase, but in any event I myself think that the courts of this country should not today enforce a contract to smuggle goods into or out of a foreign and friendly State.

There may, of course, be laws the enforcement of which would be against "morals." In such a case an exception might be made to the general principle. The point can be dealt with if it arises.

In conclusion, I would like to say a word as to the scope of the word "involves" in my statement of the question raised in the present appeal. One has, at one end of the scale, a contract which on its face necessitates a breach of the foreign law: a contract to deliver prohibited goods in the territory. At the other end one may have a contract of sale legal on its face at a normal market price, the vendor suspecting or knowing that the buyer intends to use the goods for an illegal purpose in a foreign country. The same problem arises when a contract is said to be unenforceable as immoral or illegal under our own law: *Pearce* v. *Brooks*.[45] In *Foster* v. *Driscoll*[46] the majority found that the evidence established a joint enterprise to import whisky into the United States. "It is not a case," said Sankey L.J.,[47] "where one or other of them merely knew that the whisky was "going to the States." I am never very clear as to the effect of "mere" and "merely," though I may have used one or other myself. If the question is one of illegality under our law, the contract is unenforceable if the defendant knew that the goods or money or other consideration were to be used for a purpose immoral or illegal under our law.

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[42] [1929] 1 K.B. 470.
[43] Cas.t.Hard. 85.
[44] [1920] 2 K.B. 287.

It would be convenient if the same principle was applied but it does not arise directly in this case.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Buckeridge & Braune; Stuart Hunt & Co.*

F. C.

[45] (1866) L.R. 1 Ex. 213.
[46] [1929] 1 K.B. 470.
[47] Ibid. 515.

J. C.*
1958
May 7.

In re PARLIAMENTARY PRIVILEGE ACT, 1770.

Parliament—Privilege—Issue of writ—Writ against member in respect of proceeding in Parliament—Whether treatment by Commons of writ as breach of privilege contrary to Parliamentary Privilege Act, 1770 (10 *Geo.* 3, *c.* 50)—*Bill of Rights*, 1688 (1 *Will. & Mary, sess.* 2, *c.* 2), *art.* 9.

Article 9 of the Bill of Rights, 1688, declares that "The freedom "of speech and debates or proceedings in Parliament ought not to

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* *Present*: VISCOUNT SIMONDS, LORD GODDARD, LORD MORTON OF HENRYTON, LORD REID, LORD RADCLIFFE, LORD SOMERVELL OF HARROW and LORD DENNING.

PARLIAMENTARY PRIVILEGE ACT, 1770, *In re.*

"be impeached or questioned in any Court or place out of "Parliament."

The Parliamentary Privilege Act, 1770, provides in section 1 that " . . . any person . . . may at any time commence and prosecute "any action or suit in any court . . . against . . . any . . . Lord of "Parliament of Great Britain, or against any of the knights, "citizens, and burgesses, and the commissioners for shires and "burghs of the House of Commons of Great Britain . . . or any "other person intitled to the privilege of Parliament . . . and no "such action . . . shall at any time be impeached, stayed or delayed "by or under colour or pretence of any privilege of Parliament."

The London Electricity Board having threatened to institute proceedings for libel against a Member of Parliament in respect of statements made by him in a letter to the Paymaster-General criticizing the board's method of disposing of scrap cable, the matter was referred to the Committee of Privileges of the House of Commons. That committee came to the conclusion that in writing the impugned letter the member was engaged in a "proceeding in Parliament" within the meaning of the Bill of Rights, and that the board in threatening to commence proceedings for libel had acted in breach of the privilege of Parliament. The committee, however, having had their attention called to the possible impact of the Parliamentary Privilege Act, 1770, on the question, recommended that the opinion of the Judicial Committee of the Privy Council should be sought on the question "whether the House would be "acting contrary to the Parliamentary Privilege Act, 1770, if it "treated the issue of a writ against a Member of Parliament in "respect of a speech or proceeding by him in Parliament as a "breach of its privileges":—

Held, that the question referred should be answered in the negative.

While the Act of 1770 (which did not extend the ambit of its predecessor of 1700 (12 & 13 Will. 3, c. 3)) was, as was the Act of 1700, apt to cover any suits, including suits for defamation, whether in or out of Parliament, and in every case to bar the plea of any privilege of Parliament, there were considerations inherent in the Act itself pointing to a necessary limitation of its meaning, and it applied only to proceedings against Members of Parliament in respect of their debts and actions as individuals, and not in respect of their conduct in Parliament as Members of Parliament, and did not abridge or affect the ancient and essential privilege of freedom of speech in Parliament—if it was read so as to have any application to such speeches, the effect was substantially to repeal article 9 of the Bill of Rights, and such a conclusion could not lightly be reached.

The Board's decision was confined to the single narrow question referred, and they did not intend either expressly or by implication to pronounce upon any other question of law. In particular they expressed no opinion whether the proceedings out of which the reference arose were "a proceeding in Parliament"—a question not discussed before them—nor on the question whether the mere issue of a writ would in any circumstances be a breach of privilege.

Burdett v. *Abbot* (1811) 14 East 1; *Stockdale* v. *Hansard* (1839) 9 Ad. & E. 1, and the *Sheriff of Middlesex Case* (1840) 11 Ad. & E. 273 referred to.

J. C.
1958

PARLIAMENTARY PRIVILEGE ACT, 1770, *In re.*

SPECIAL REFERENCE (under section 4 of the Judicial Committee Act, 1833) made pursuant to a recommendation of the Committee of Privileges of the House of Commons and an Order in Council dated December 13, 1957, of the question of law " whether the " House of Commons would be acting contrary to the Parliamentary Privilege Act, 1770, if it treated the issue of a writ against " a Member of Parliament in respect of a speech or proceeding by " him in Parliament as a breach of its privileges."

The following facts are taken from the Reasons for the Report of Judicial Committee on the reference: On February 8, 1957, the Right Honourable G. R. Strauss, a member of the House of Commons, wrote a letter to the Paymaster-General in which he called his attention to certain conduct of the London Electricity Board. The Paymaster-General, being of opinion that the question related to a matter of day-to-day administration, replied to Mr. Strauss that the responsibility lay with the board not with the Minister, and he had arranged for his officials to bring the views of Mr. Strauss to the attention of the board's chairman as a matter of urgency. An interview was accordingly held between the chairman and Mr. Strauss and some of his associates, after which the chairman wrote to Mr. Strauss demanding the unqualified withdrawal of the latter's statements in his letter of February 8, which he regarded as casting grave reflections on the integrity of the board's personnel and on the board's attitude towards its public duty. Receiving no satisfactory reply to this or a subsequent letter he then put the matter into the hands of the board's solicitors, who wrote to Mr. Strauss demanding a withdrawal and an apology and stating that, if these were not forthcoming, they were instructed to issue a writ for libel against him. To this letter the solicitors for Mr. Strauss replied that it appeared to them that the letter in question was written on an occasion of qualified privilege and that they were prepared to accept service of any proceedings on his behalf.

No writ had in fact been issued when on April 6, 1957, Mr. Strauss called the attention of the House of Commons to the letters that had passed between himself and the board and its solicitors and claimed that the threats of an action for libel in those letters were a breach of the privilege of Parliament. The Speaker of the House of Commons ruled that the threats constituted a prima facie case of breach of privilege and the House resolved to refer the matter to its Committee of Privileges. On October 30, 1957, that committee reported. They pointed out that the answer to the question whether these threats constituted in themselves a breach of privilege depended in the main on the meaning of article 9 of the Bill of Rights, but, having had their attention called to the possible impact of the Parliamentary Privilege Act, 1770, upon the question, came to the following conclusions:

"(*a*) In writing the letter of February 8, 1957, to the "Paymaster-General of which the London Electricity Board "complain, Mr. Strauss was engaged in a 'proceeding in Par-"'liament' within the meaning of the Bill of Rights of 1688.

"(*b*) The London Electricity Board in threatening by the "letters from themselves and their solicitors to commence pro-"ceedings for libel against Mr. Strauss for statements made by "him in the course of a proceeding in Parliament are threatening "to impeach or question the freedom of Mr. Strauss in a Court or "place outside Parliament, and accordingly the London Elec-"tricity Board and their solicitors have acted in breach of the "privilege of Parliament.

"(*c*) The opinion of the Judicial Committee of the Privy "Council should be sought on the question whether the House "would be acting contrary to the Parliamentary Privilege Act, "1770, if it treated the issue of a writ against a Member of "Parliament in respect of a speech or proceeding by him in "Parliament as a breach of its privileges."

On December 4, 1957, the House of Commons presented a humble address to Her Majesty in accordance with conclusion (*c*) of the committee, and on December 13 an Order in Council was made accordingly.

1958. March 10, 11, 12 and 13. *Sir Reginald Manningham-Buller Q.C., A.-G., Rodger Winn* and *C. H. de Waal* for the Attorney-General in support of an affirmative answer to the question referred. Of the conclusions of the Committee of Privileges the opinion of the Judicial Committee is sought solely on the effect of the Act of 1770. The preamble to the Act itself indicates to some extent the meaning then attached to the phrase "privilege of Parliament." The effect of the Act, it is submitted, is partly to change the law and partly declaratory of it. The enacting words "be it enacted . . . that . . . any person or "persons shall and may at any time commence and prosecute "any action or suit in any court of record . . . against" members of the House of Commons are general and all-embracing. The enacting words conclude with: " and no such action, suit or any " other process or proceeding thereupon shall at any time be " impeached, stayed, or delayed by or under colour or pretence " of any privilege of Parliament." The Act of 1770 followed four earlier Acts, namely, 12 & 13 Will. 3, c. 3 (1700), which cut down the periods of the privileged time—its effect was not to enlarge the jurisdiction; 2 & 3 Anne, c. 18 (1703); 11 Geo. 2, c. 24 (1738), and 4 Geo. 3, c. 33 (1763). In relation to the Act of 1770 the submissions may be summarized by saying, first, that that Act in part altered the law and in part was declaratory of the existing law. It altered the law by abolishing that part of the privilege of Parliament which protected Members of Parliament from actions or suits within certain times. It was declaratory of the existing law by enacting that no such action should be impeached, stayed or delayed by or under colour or pretence of any privilege of Parliament. Apart from the privilege of Parliament as referred to in those earlier Acts, that is, freedom from suit and freedom from arrest while Parliament was sitting, no action could lawfully be impeached, stayed or delayed by any privilege of Parliament before that time. That is the proposition.

The actual institution of process must, it is submitted, be separated from the question of the jurisdiction of the courts. On this reference may be made to the address of the House of Lords to Her Majesty in 1704 after the decision in *Ashby* v. *White* [1]; the position as it then was, it is submitted, was correctly stated in the passage in 17 Lords Journals, at p. 677, where it was said: " Resolved. That every freeman of England, who " apprehends himself to be injured, has a right to seek redress " by action at law; and that the commencing and prosecuting " an action at common law against any person (not entitled to " privilege of Parliament) is no breach of the privilege of Parlia- " ment." The resolution of 1704 correctly stated the legal position then; it also correctly states the legal position now. The House of Commons did not agree with that resolution, as they thought that such actions might lead to the determination by the courts of matters cognizable by Parliament alone. That is dealt with in 14 Journals of the House of Commons, pp. 559–560. It is submitted that the Act of 1770 did not, as the Acts 12 & 13 Will. 3 and 2 Geo. 2 expressly did not, in any way alter or affect the jurisdiction of the courts. Those Acts did not make anything cognizable by the courts which had not been cognizable before.

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[1] (1702) 2 Ld.Raym. 938.

In so far as the Act of 1770 changed the law, it only abolished the ban, already restricted by the earlier Acts, on the institution of proceedings; it in no way restricted or amended the Privilege of Parliament Act of 1512, i.e., Strode's Act, or the Bill of Rights of 1688. The effect of Strode's Act was to render all suits contrary to the provisions of that Act void, that is to say, to deprive the courts of jurisdiction to hear such suits. It is also to be observed that that Act gave the injured Member of Parliament a right of action for treble damages, an action on the case. So it follows from that that the courts then had the right, and indeed the duty, to decide whether the original proceedings against the member were contrary to the provisions of the Act. The passing of the Act in 1512 does not support the view that the institution of such proceedings as were brought against Sir Richard Strode at that time were regarded as of themselves constituting a breach of the privilege of Parliament and punishable as such.

Next, in 1629, proceedings were taken against Sir John Elliot[2] for making seditious speeches in the House of Commons, and following upon that, in 1667, the House of Commons passed a resolution that the judgment given "against Sir John Elliot . . . "in the King's Bench, was an illegal judgment and against the "freedom and privilege of Parliament." The case was brought before the House of Lords on a writ of error and it was directed that the judgment in the King's Bench should be reversed. It is clear that the decision of the House of Lords on that writ of error, after consultation with the House of Commons, was based upon the view that Strode's Act was of general application and that consequently the whole prosecution of Sir John Elliot was misconceived.

Turning to the Bill of Rights, Anson's Law and Custom of the Constitution, 5th ed., vol. 1, p. 38, says that the Bill of Rights "merely states the points which had been from time to "time in issue between the Crown and its subjects since the "reign of Edward I, and on all points it declares in favour of "the nation and against the Crown." In the First Report of the Select Committee of the House of Commons of 1810, which was just before the decision in *Burdett* v. *Abbot*[3] and relative to the proceedings against Sir Francis Burdett, it was stated, inter alia, that: "All these Acts [the Act of 1770 and its "predecessors] merely apply to proceedings against members "in respect of their debts and actions as individuals, and not "in respect of their conduct as Members of Parliament; and

[2] (1629) 3 St.Tr. 293.

[3] (1811) 14 East 1.

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"therefore they do not in any way abridge the ancient law and "privilege of Parliament so far as they respect the freedom and "conduct of Members of Parliament as such, or the protection "which the House may give to persons acting under its autho-"rity." It should be borne in mind, however, that Sir Francis Burdett's was not a case involving any freedom of speech in the House of Commons, and it is submitted that there is no basis for putting the limitation which that committee of the Commons sought to put on the legal effect of the Acts to which it referred. In the report of *Stockdale* v. *Hansard* [4] there is a list of conduct which was regarded as a breach of privilege by the House of Commons and for which the House exercised punitive powers which could hardly be justified under the law of the land. So far as that case treats these Acts as applying only to actions for debt and so on against individual members it is admittedly against me. The Bill of Rights enacted, it is submitted, that the courts had no jurisdiction in either civil or criminal proceedings where those proceedings would involve the impeaching or questioning of the freedom of speech or debates in Parliament. That that was the effect of the enactment was recognized in *Ex parte Wason*,[5] *Stockdale* v. *Hansard* [6] and *Bradlaugh* v. *Gossett*.[7] Assuming that a statement does come within the terms of the Bill of Rights, then the courts have no jurisdiction in relation to any action in respect of that statement.

The next point is that the issue of a writ does not involve the exercise of jurisdiction by the court; it is an act of the party, and the party alone. That was established in *Clarke* v. *Bradlaugh*,[8] and, if that be right, the mere issue of a writ cannot involve any breach of the privilege of exclusive jurisdiction which the Bill of Rights confers on Parliament, for there is no breach of article 9 until some other court or place exercises jurisdiction; and there can be no question of any exercise of jurisdiction or of a breach of this privilege of the Houses of Parliament until the hearing of a motion to strike out the statement of claim, if the defendant takes the point, or the summons for directions, if the point is not taken. It is only at that stage when one gets any questioning of what has happened in Parliament in some other court or place; the issue of a writ does not constitute that. The issue of a writ could not be impeached on the ground that it was a breach of the privilege recognized in the Bill of Rights.

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[4] (1839) 9 Ad. & E. 1.

[5] (1869) L.R. 4 Q.B. 573.

[6] 9 Ad. & E. 1.

[7] (1884) 12 Q.B.D. 271.

[8] (1881) 8 Q.B.D. 63, 66, 68.

It has been finally established that the privileges of Parliament are part of the law of the land: *Stockdale* v. *Hansard.*[9] What are the privileges of Parliament is a matter which does fall to the courts to determine. That the House had the sole and exclusive jurisdiction to determine upon the existence and extent of its privileges was unanimously rejected by the judges in *Stockdale* v. *Hansard.*[9] [Reference on this point was also made to Erskine May's Parliamentary Practice, 16th ed., pp. 168, 172, which, it was submitted, admirably summed up the position as it now stood.] It is for the House to decide whether any particular conduct constitutes a breach of its privileges, but it cannot confer upon itself either by resolution or by a decision in relation to any particular conduct any new privilege. Its existing privileges can only be altered, added to or abolished by Act of Parliament, and in no other way.

On the question of what were and are the privileges of the House recognized by our law in regard to the institution of proceedings against members of the House, the true basis of all parliamentary privilege is stated in vol. 1 of the 1818 edition of Hatsell's Parliamentary Precedents, pp. 1–8. [Reference was also made to Prynne's Parliamentary Writs (1664), p. 837.] Freedom from arrest as part of the machinery of process is quite a distinct privilege from the privilege of freedom of speech, and is not a personal boon enjoyed by individual members but a privilege of Parliament. The privilege of freedom from arrest and freedom from being impleaded was the only privilege affecting the institution of proceedings. It is a privilege of Parliament which is wholly unconnected with and quite distinct from the privilege of freedom of speech. [Reference was made to *Benyon* v. *Evelyn*[10]; *Reg.* v. *Paty*[11]; *Goudy* v. *Duncombe*,[12] and *Cassidy* v. *Steuart.*[13]] It would appear that the last case where the House of Commons punished persons issuing a writ was *Mitton's* case[14] in 1757. There has apparently been no case where the issue of a writ has been treated as a breach of privilege by the House of Commons since 1757. There have, on the other hand, been at least four cases since 1770 where actions against members have been allowed to proceed without the actions being called in question as a breach of the privileges of the House: *Burdett* v. *Abbot.*[15] The second case since 1770—an extremely important case—where no suggestion was made in the House of Commons and no attempt was made to treat the issue of a writ as a breach of privilege, is *Dillon* v. *Balfour*,[16] and this was an issue of a writ in relation to words spoken in the House. The third case is *Chaffers* v. *Goldsmid*,[17] which was again a case of an action against a member, and, again, no dealing with it by the House as a breach of privilege. In the fourth case, *Gruban* v. *Booth*,[18] Booth, a Member of Parliament, wrote a letter to the Minister of Munitions concerning Gruban, a German who had been interned, and Gruban brought an action against Booth. It might, perhaps, have been said that writing that letter constituted a proceeding in Parliament, but there was no suggestion at that time that the use of this letter in the courts for determining the propriety of Booth's conduct was in any way a breach of the privileges of the House or called into question matters excepted from the jurisdiction of the courts.

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[9] 9 Ad. & E. 1.

[10] (1664) Sir O. Bridgman 324.

[11] (1704) 2 Ld.Raym. 1105.

[12] (1847) 1 Ex. 430.

[13] (1841) 2 M. & G. 437.

[14] (1757) 27 Commons Jo. 686.

[15] 14 East 1.

The decision in *Dillon* v. *Balfour* [19] is, it is submitted, correct and should be followed. In Gatley on Libel and Slander, 4th ed., p. 168, and in many other textbooks, statements made in the course of parliamentary proceedings are dealt with under the heading of "Absolute Privilege." That is not the correct heading. The courts have no jurisdiction to try a case which involves freedom of speech and debates and proceedings in Parliament, whether or not any defendant relies on any plea of absolute privilege. There are four cases in which Parliament has punished people for instituting proceedings for defamation either against petitioners to the House or witnesses before committees of the House: *Meggott's* case [20]; *Gee's* case [21]; *Phillips'* case,[22] and *Harbin's* case.[23] None of those proceedings was on the basis that the offending litigants were in breach of the privilege of freedom of speech. [*Goffin* v. *Donnelly* [24] was also referred to.] It has not been possible to discover any case in which the House of Commons has sought to punish the threat of a writ in relation to proceedings involving the freedom of speech and debates and proceedings in Parliament—where it has been dealt with by the House as a breach of its privileges.

As has been submitted, it is for the court to decide whether it has jurisdiction to hear a case, and not Parliament: *Stockdale*

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[16] (1887) 20 L.R.Ir. 600.

[17] [1894] 1 Q.B. 186; 10 T.L.R. 14.

[18] (1915) Cases in Court, Sir Patrick Hastings, K.C., 108, 114–128.

[19] 20 L.R.Ir. 600.

[20] (1696) 11 Commons Jo. 591.

[21] Ibid. 599.

[22] (1845) 81 Parliamentary Debates 1436.

[23] (1845) 82 Parliamentary Debates 431.

[24] (1881) 6 Q.B.D. 307.

v. *Hansard*[25]; *Wilkinson* v. *Barking Corporation.*[26] One may get the House of Commons saying: "This particular piece of "conduct is a breach of our privilege because we are going to "treat something as a proceeding in Parliament in modern days." They might commit for contempt and, under the old authorities, nothing could be done in the courts. But assuming that they did not go so far as to commit for contempt, but merely, say, admonished, then supposing a writ is issued, the court would have to determine whether as a matter of law that particular piece of conduct did amount to a proceeding in Parliament. One might get a conflict of view in that way, but the law is to be interpreted by the courts. Since the Act of 1770, and before it, when properly understood, it is not a proper exercise of the power of the House of Commons to treat the issue of a writ in relation to freedom of speech or matters within article 9 as a contempt. For the House to treat the mere issue of a writ as a breach of privilege is not only treating the Act of 1770 as if it did not exist, but is also really extending its privileges, or seeking to extend them, as the House had done before without success.

In conclusion, there was a very striking passage in the address in relation to the *Five Ailesbury Men*[27] which said: "These "proceedings are wholly new and unprecedented. It is the "birth-right of every Englishman, who apprehends himself to be "injured, to seek for redress in your Majesty's courts of justice; "and if there be any power can control this right, and can "prescribe when he shall and when he shall not be allowed the "benefit of the laws, he ceases to be a freeman, and his liberty "and property are precarious." That is not only a striking passage, but a correct statement of the position in regard to anyone who institutes proceedings. The answer to the question referred should be that the House of Commons would be acting not only contrary to the Parliamentary Privilege Act of 1770 if it treated the issue of a writ against a Member of Parliament in respect of a speech or proceeding by him in Parliament as a breach of its privileges, but also would be acting contrary to the law of this country as it existed before that date.

Gerald Gardiner Q.C. and *Conolly H. Gage* for the London Electricity Board, also in support of an affirmative answer to the question referred, first cited *John Robinson & Co. Ltd.* v. *The King*[28] for the statement of Atkin L.J. on the construction of

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[25] 9 Ad. & E. 1.

[26] [1948] 1 K.B. 721; 64 T.L.R. 230; [1948] 1 All E.R. 564.

[27] (1704) 17 Lords Jo. 698.

[28] [1921] 3 K.B. 183; 37 T.L.R. 698.

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statutes. Here the question before the Board is described in the Order in Council as "a certain question of Law"; *Stockdale* v. *Hansard* [29] decided, first, that the lex et consuetudo parliamenti is part of the law of the land; secondly, that the courts have cognizance of it, being part of the law of the land; and, thirdly, that the courts, and only the courts, can decide what it is. It is not therefore proposed to deal with resolutions or expressions of opinion in this field from time to time made by the House of Commons. In the question which the Board is asked to answer, there is, it is submitted, an ambiguity which it is important should be resolved. In the question appear the words "a speech "or proceeding by him in Parliament." "Proceeding in Parliament" is capable of two meanings. It may mean that which on a true construction of the Bill of Rights is a proceeding in Parliament, or it may mean any thing which the House of Commons may choose to say is "a proceeding in Parliament," even if it is not in law a proceeding in Parliament within the meaning of the Bill of Rights. It is submitted that the words "proceeding "in Parliament," as it was called a question of law, must mean that which on a true construction of the Bill of Rights is a "proceeding in Parliament."

The next proposition is that there is really only a privilege against arrest: *Donne* v. *Walsh* [30]; *Ryver* v. *Cosins* [31]; while there was at that time freedom from arrest, there was no privilege or custom in relation to not being impleaded. *Hodges* v. *Moor* [32] tends to show that at that date, 1620, the only privilege was to have the action stayed during the sitting of Parliament. Then in 1629 came *Sir John Elliot's* case,[33] and in 1664 *Benyon* v. *Evelyn*,[34] the latter of which treated *Donne* v. *Walsh* [35] and *Ryver* v. *Cosins* [36] as being still good law. It is submitted that the privilege of the Bill of Rights extends not only to Members of Parliament but would no doubt cover the Serjeant-at-Arms and officers of the House, and, as has been since held, those summoned to the House to give evidence before committees of the House: *Lake* v. *King*.[37] [Reference was also made to *Dangerfield's* case, note to *Rex* v. *Frances* [38]; *Jay* v. *Topham* [39];

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[29] 9 Ad. & E. 1.

[30] (1473) Hatsell's Precedents, vol. 1, 41.

[31] (1472) Hatsell's Precedents, vol. 1, 43.

[32] (1620) Latch 15.

[33] 3 St.Tr. 293.

[34] Sir O. Bridgman 324.

[35] Hatsell, vol. 1, 41.

[36] Hatsell, vol. 1, 43.

[37] (1668) 1 Saund. 120.

[38] (1685) 11 St.Tr. 503; sub nom. *Rex* v. *Dangerfield* (1685) 3 Mod. 68.

[39] (1689) 12 St.Tr. 822.

Ashby v. *White*,[40] and *Reg.* v. *Paty*,[41] and to the difference between the views as expressed in the first edition of Blackstone's Commentaries in 1765, which were not unfavourable to the House of Commons, and those in the fifth edition, which was published a year after the Parliamentary Privilege Act: see 1st ed., vol. 1, p. 159; 5th ed., vol. 1, p. 165.]

The Attorney-General has referred to four cases in which one would have anticipated this privilege, if it was thought to exist against proceedings, being raised, and there are others, mainly of libel of a criminal nature, which may be relevant: *Rex* v. *Lord Abingdon*[42]; *Rex* v. *Creevey.*[43] *Stockdale* v. *Hansard*[44] is the most important decision for the purposes of the present case, the importance of it being in its decision that the lex parliamenti is part of the law of the land and it is for the courts alone to decide what it is. [*Goffin* v. *Donnelly*[45] was also referred to.]

In paragraph 8 of the Report of the Committee of Privileges in the present case it is stated that: "No one today would "question the claim that the system of questions by members to "Ministers and the answers given by Ministers are 'proceedings "'in Parliament,' even though the question be written down outside Parliament and sent by post to the House of Commons." That statement is inaccurate and I certainly question it. The Report of the Select Committee on the Official Secrets Act in 1938, with which the House of Commons agreed, and which in part is set out in the Report of the Committee of Privileges in the present case, stated in paragraph 3 that: "The article in the "Bill of Rights is not necessarily an exhaustive definition of the "cognate privileges. But even assuming that it is, the privilege "is not confined to words spoken in debate or to spoken words, "but extends to all proceedings in Parliament. While the term "'proceedings in Parliament' has never been construed by the "courts, it covers both the asking of a question and the giving "written notice of such question, and includes everything said or "done by a member in the exercise of his functions as a member "in a committee of either House, as well as everything said or "done in either House in the transaction of parliamentary business." The submission is that that is not really supported by any legal authority. "Proceedings in Parliament" mean proceedings which take place either in the Chamber or committees of the House. Further, the issue of a writ does not challenge the freedom of speech or debates in Parliament.

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[40] 2 Ld.Raym. 938.
[41] 2 Ld.Raym. 1105.
[42] (1794) 1 Esp.N.P. 226.
[43] (1813) 1 M. & S. 273.
[44] 9 Ad. & E. 1.
[45] 6 Q.B.D. 307.

In *Reg.* v. *Bunting*[46]—a Canadian case—O'Connor J., in the course of a dissenting judgment, said that a Member of Parliament "is privileged and protected by lex et consuetudo "parliamenti in respect of anything he may say or do within the "scope of his duties in the course of parliamentary business." *Coffin* v. *Coffin*[47]—an American case—cannot really be any authority, in a legal sense, for what the privileges of the British House of Commons are. The Bill of Rights should be given its ordinary construction so far as the words "speech and debates "or proceedings in Parliament" are concerned. It is now 269 years since the Bill of Rights, and never in all that time has a defendant ever applied to a court in limine on the ground that the issue of a writ was a breach of parliamentary privilege and a nullity. The court has always gone on to decide the case, including the question whether it had jurisdiction, except only in *Rivlin* v. *Bilainkin*,[48] which is the only case in which it has ever been suggested that proceedings themselves would be improper if brought as being contrary to parliamentary privilege. It is submitted that the Bill of Rights in no way derogated from the ancient and inalienable right of the subject to seek to have recourse to the courts of the country in order to seek justice according to law. The privilege of Parliament is part of the law of England and as such the courts of England have cognizance of it and jurisdiction to determine as a matter of law whether conduct of which a member of the public complains falls within the ambit of parliamentary privilege. The member of the public, therefore, who issues a writ against a Member of Parliament in respect of a speech or proceeding by him in Parliament is not directly calling the freedom of speech or proceedings in Parliament into question, but is merely asserting that the Member of Parliament's conduct is not covered by Parliament's admitted privileges. If the courts are of opinion that the member's conduct is covered by parliamentary privilege they can and will take effective steps to protect the member against any further prosecution of the action. [Reference was also made to Porritt's The Unreformed House of Commons (1903), vol. 1, pp. 567 et seq., under the heading "Privileges of Members," and to Holdsworth's History of English Law, vol. 10, pp. 544 et seq.]

The question referred should be answered in the affirmative.

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[46] (1885) 7 O.R. 524.

[47] (1802) 4 Mass.Rep. 1.

[48] [1953] 1 Q.B. 485; [1953] 1 All E.R. 534.

Sir Frank Soskice Q.C. and *Bryan Clauson* for the Treasury Solicitor in support of a negative answer to the question referred. There is no lis between the parties here so far as the Treasury Solicitor and the Attorney-General are concerned. There are two questions which the Board may think it right to decide: (1) Supposing the Act of 1770 and the four earlier Acts mentioned by the Attorney-General had never been passed, would the issue of a writ in the circumstances described in the question referred be a breach of privilege? (2) If the answer to that question is "Yes," is the effect of the Act of 1770 and the earlier Acts to prevent it from being a breach of privilege any longer? The next submission on the form of the question referred is that the crucial words in it are "in respect of a speech or proceeding . . . "in Parliament." Then the question immediately arises as to what is connoted by the words in that context "in respect of," and the answer is that at least certain minimal circumstances are connoted. It must be connoted by the words "in respect of" that the writ either makes it plain by its indorsement or that there are other circumstances which make it plain that, as is indeed the fact, the person issuing the writ intends by his writ to complain of the speech or proceeding and to ask for damages or other relief from the Member of Parliament because of the defamatory utterance made by him in that speech or in the course of that proceeding. The problem posed, it is submitted, does admit of a short and simple answer: Yes, the person who issues a writ is clearly questioning the Member of Parliament's speech when by his writ he claims damages in respect of that speech. If one goes to the court and asks the court to say that he is entitled to damages for something which the court says is a speech in Parliament, he is questioning that speech.

The privilege of freedom of speech has really to be considered quite separately from other privileges, and in particular from the privilege of freedom from arrest or from being impleaded, however it is described. In Halsbury's Laws of England, 2nd ed., vol. 24, p. 344, para. 695 et seq., there are no less than eight separate heads of privilege set out. Freedom from arrest is distinct from freedom of speech, which is the important one. Privileges for the purposes of judicial process depend on long-established principles of the common law which are set out in Fraser on Libel and Slander, 7th ed., pp. 121–122, and restated in *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson.*[49] With regard to the privilege of freedom of

[49] [1892] 1 Q.B. 431.

speech, on the true construction of the Privilege of Parliament Act, 1512 (Strode's Act), which, it is submitted, is of general application, and of article 9 of the Bill of Rights, an action brought against a Member of Parliament in respect of a speech made by him in Parliament or a proceeding by him in Parliament is utterly void and of no effect. It is accepted that the issue of a writ is not a judicial act (*Clarke* v. *Bradlaugh*[50]); it is the act of the party, but in doing that very thing the party is questioning the member's speech. The authority for stating that Strode's Act is of general application is *Burdett* v. *Abbot*.[51] In *Benyon* v. *Evelyn*[52] in relation to "liberty of speech, not reporting nor questioning out of the "Parliament what is said in Parliament," it was said "which "are, as it were, of the essence of the Parliament, and not dis-"pensable withal, and of which every man concerned ought at "his peril to take notice." *Jay* v. *Topham*,[53] *Rex* v. *Lord Abingdon*[54] and *Rex* v. *Wright*[55] indicate the sort of language in which judges have referred to the question of their jurisdiction in these matters. [Reference was also made to *Burdett* v. *Abbot*[56] and *Rex* v. *Creevey*.[57]]

The privilege of freedom of speech protects a Member of Parliament not only against civil proceedings but against criminal proceedings: *Chaffers* v. *Goldsmid*.[58] Supposing that one were considering not a writ for damages but an information sworn before a magistrate asserting that the Member of Parliament had uttered in the course of his speech in the House something which amounted to a criminal libel on the plaintiff, could it be said that that was not a breach of privilege in that it did not constitute a questioning? In principle, if the answer to that question is that it was, then by parity of reasoning it is equally so in the case where a party issues a writ in civil proceedings. *Stockdale* v. *Hansard*[59] is a case where there is a reference to the Bill of Rights, and though one might well have expected that, if the Act of 1770 was to be construed as in some way limiting what the Bill of Rights had prohibited, it would have been so stated, one did not find it. I have never found any passage in any case where the Bill of Rights is referred to in relation to the Act of 1770. In *Ex parte Wason*[60] it was said that: "It is clear that

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[50] 8 Q.B.D. 63.
[51] 14 East 1.
[52] Sir O. Bridgman 324.
[53] 12 St.Tr. 822.
[54] 1 Esp.N.P. 226.
[55] (1799) 8 Term Rep. 293.
[56] 14 East 1.
[57] 1 M. & S. 273.
[58] [1894] 1 Q.B. 186.
[59] 9 Ad. & E. 1.
[60] (1869) L.R. 4 Q.B. 573.

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"statements made by members of either House of Parliament "in their places in the House, though they might be untrue to "their knowledge, could not be made the foundation of civil or "criminal proceedings." *Bradlaugh* v. *Gossett* [61] is rather like *Rex* v. *Sir R. F. Graham-Campbell*,[62] in which a principle like that of freedom of speech is asserted, namely, that the courts will not even inquire into matters of the administration of the House itself. In *Dillon* v. *Balfour* [63] it was said that no writ can issue against a Member of Parliament for anything said in Parliament. If that is right, it goes the whole length that I need to go.

The Attorney-General has said that it is impossible to find a case in which the House of Commons has treated the issue of a writ as a breach of privilege. The explanation of that, it is submitted, is to be found in the passage in *Burdett's* case [64] which states: "It appears, that in the several instances of "actions commenced in breach of the privileges of this House, "the House has proceeded by commitment, not only against the "party, but against the solicitor and other persons concerned in "bringing such actions; but your Committee think it right to "observe that the commitment of such party . . . would not "necessarily stop the proceedings in such action." *Sturmy's* case [65] appears to be the only one in which the House did treat such an action as a breach of privilege.

It is next submitted that the Act of 1770 did not in any way affect the pre-existing situation in so far as the privilege of freedom of speech was concerned. This submission is made on the assumption that, apart from the Act of 1770, it would have been a breach of privilege to issue a writ. On this aspect of the argument reference may be made first to some principles of construction which have been laid down or restated in the House of Lords in *Attorney-General* v. *Prince Ernest Augustus of Hanover*.[66] These principles are: (1) The court construing a statute which contains a preamble must look at everything—the whole statute, the context, the mischief and so on. (2) Where the enacting words admit of no ambiguity they must prevail over everything else. (3) Enacting words, however, and, in particular, general words, may at first sight appear unambiguous, but when looked at in the context of the whole Act in the large sense, may be seen to admit of ambiguity, and in that case the court construing them, in order to resolve the ambiguity, must again look at everything as indicated above. That being so, it becomes material to look in particular at the four Acts preceding that of 1770, namely, 12 & 13 Will. 3, c. 3 (1700), 2 & 3 Anne, c. 18 (1703), 11 Geo. 2, c. 24 (1738), and 4 Geo. 3, c. 33 (1763). The scheme of those Acts in relation to the privilege was building up to the Act of 1770, the " close season " of privilege being removed by the Act of 1770.

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[61] 12 Q.B.D. 271.

[62] [1935] 1 K.B. 594; 51 T.L.R. 198.

[63] 20 L.R.Ir. 600, 615.

[64] 14 East 1.

[65] (1676) 9 Commons Jo. 399.

[66] [1957] A.C. 436; [1957] 1 All E.R. 49.

With regard to the construction of the Act of 1770, the Attorney-General said that the Act was in part declaratory and in part enacted a procedural change—the change being that it removed the barrier that a writ could not be issued in certain times. So far as jurisdiction was concerned, the Attorney-General said that it merely declared the pre-existing situation, and stated what was the law before. That, it is submitted, cannot be right, unless one excludes the privilege of freedom of speech from section 1 of the Act of 1770. The Attorney-General is bound to say one of two things: either the privilege of Parliament referred to in the section does not include the privilege of freedom of speech, or, if those words do include the privilege of freedom of speech, then one is driven to the conclusion that article 9 of the Bill of Rights is repealed by the section and that there is no privilege of freedom of speech. Between those alternatives the right one, it is submitted, is the first, and that again in this Act, as in the earlier ones, the expression " by or under colour or " pretence of any privilege of Parliament " is an expression which means " any relevant privilege of Parliament," and the only relevant privilege of Parliament is that of freedom from arrest and freedom from impleadment, and does not include the privilege of freedom of speech. It is not unjust that it should be considered as part of our law that a Member of Parliament should not have writs issued against him.

Sir Reginald Manningham-Buller Q.C., A.-G., in the course of his reply, said: " In the event of your Lordships answering " the question referred to you for your consideration in the negative, solely because the Parliamentary Privilege Act, 1770, " neither removes nor restricts any relevant privilege of the " House of Commons, it is respectfully submitted that your Lordships should deem it proper, for the assistance of the House " of Commons, to declare your opinion how the same question " should be answered by reference to the law of the United

"Kingdom." I understand that Sir Frank Soskice also accepts that form of submission. The way the matter is put by Mr. Gardiner is: "Your Lordships are invited to consider whether, "in expressing your opinion on the question referred for your "consideration, it would not be of assistance to the House of "Commons that your Lordships should say, if you are of that "opinion, that, apart altogether from the effect of the provisions "of the Parliamentary Privilege Act, 1770, the Bill of Rights in "no way derogated from the ancient and inalienable right of the "subject to seek to have recourse to the courts of the country "in order to seek justice according to law: and further that "privilege of Parliament is part of the law of England and as "such the courts of England have cognizance of it and jurisdiction to determine as a matter of law whether conduct of which "a member of the public complains falls within the ambit of "parliamentary privilege, and that, therefore, the bona fide issue "of a writ, pursuant to a subject's right to seek justice according "to law, cannot be a breach of privilege."

I am not seeking to alter or extend the terms of reference.

May 7. Their Lordships' reasons for their report were delivered by Viscount Simonds, who stated the facts set out above and continued: Their Lordships now turn to the question referred to them. They point out at the outset that this question is a very narrow one. It is independent of the conclusions (*a*) and (*b*) in the conclusions of the Committee of Privileges above set out. Upon them their Lordships are required to express, and express, no opinion. Before considering the text of the Act of 1770 and certain other Acts with which it is inseparably connected, it is only necessary to observe that the words "in respect of a "speech or proceeding by him in Parliament" refer (though not quite accurately) to that part of the Bill of Rights by which, after reciting that "the late King James the Second by the assistance "of divers evil Counsellors Judges and Ministers employed by "him did endeavour to subvert and extirpate the Protestant "religion and the laws and liberties of this Kingdom" by the divers means therein set out, "the Lords Spiritual and Temporal "and Commons pursuant to their respective letters and elections "being now assembled in a full and free representative of this "nation . . . do in the first place (as their ancestors in like case "have usually done) for the vindicating and asserting their "ancient rights and liberties declare. . . .

" 9. That the freedom of speech and debates or proceedings in " Parliament ought not to be impeached or questioned in any " court or place out of Parliament."

The Bill of Rights was enacted in 1688. In 1700 the first of the group of Acts was passed which fall for their Lordships' consideration. They are clearly of opinion, and it appeared to be common ground between the parties, that the ambit of the later Acts was no greater than that of the earlier. This Act must therefore be closely examined. It is the Act 12 & 13 Will. 3, c. 3, and is entitled " An Act for preventing any inconveniences that may " happen by privilege of Parliament." Its opening words, which can hardly be called a preamble, are significant. " For the " preventing of all delays the King or His subjects may receive in " any of His Courts of Law or Equity and for their ease in the " recovery of their rights and titles to any lands tenements or " hereditaments and their debts or other dues for which they have " cause of suit or action "—here is the declared purpose of the Act, which goes on to enact that from and after June 24, 1701, any persons may commence and prosecute any action or suit in any of His Majesty's courts of record or other courts therein enumerated against any peer of this Realm or Lord of Parliament or against any of the knights, citizens and burgesses of the House of Commons for the time being, or against any of their menial or other servants or any other person entitled to the privilege of Parliament at any time from and immediately after the dissolution or prorogation of any Parliament until a new Parliament shall meet or the same be reassembled, and from and immediately after any adjournment of both Houses of Parliament for above the space of 14 days until both Houses shall meet or reassemble, and that the said respective courts shall and may after such dissolution, prorogation or adjournment proceed to give judgment and to make final orders, decrees and sentences and award execution thereupon, any privilege of Parliament to the contrary notwithstanding.

It is convenient to pause at these words which conclude the first section of the Act and to ask what is its scope. It is not in doubt that its language is comprehensive. It is apt to cover any suits, including suits for defamation whether in or out of Parliament, and in every case to bar the plea of any privilege of Parliament. It should therefore prima facie be read in this sense. But there are considerations, which will be strengthened by later sections, pointing to a necessary limitation of its meaning. In the first place, as has already been noted, the declared purpose of the Act is to prevent delay in the bringing of those actions to which the Act relates. The Members of both Houses had long notoriously abused their privileges in respect of immunity from civil actions and arrest, which by ancient usage extended during the sitting of Parliament and for 40 days after every prorogation and 40 days before the next appointed meeting. It was to curtail this delay in the commencement and prosecution of suits that the Act was avowedly passed, and by clear implication it referred only to those suits which, subject to delay, were ultimately enforceable. But there was no right at any time to impeach or question in a court or place out of Parliament a speech, debate or proceeding in Parliament. No question of delay or ultimate enforceability could arise in regard to that privilege which demanded that a Member should be able to speak without fear or favour in Parliament in the sure knowledge that neither during its sitting nor thereafter would he be liable to any man for what he said and that Parliament itself would protect him from any action in respect of it either by the Crown or by a fellow subject. Here, then, is a strong reason for limiting the meaning of the general words which have been quoted.

In the second place, the section empowers not only the subject to "commence and prosecute any action or suit" but the court "to proceed to give judgment and to make final orders decrees "and sentences and award execution thereon." The last words of the section "any privilege of Parliament to the contrary "notwithstanding" must apply equally to all the preceding words. If, then, the Act is read so to have any application to speeches made in Parliament, the effect is substantially to repeal the ninth article of the Bill of Rights. It is not a question of a writ being issued in a court of law and the defendant then making a plea in bar or a plea to the jurisdiction on the ground of privilege of Parliament. Final orders, decrees, sentences, and execution may follow the commencement and prosecution and no plea of privilege is to be available. It appears to their Lordships that a consideration of this consequence supports the view that the Act applies only to proceedings against Members of Parliament in respect of their debts and actions as individuals and not in respect of their conduct in Parliament as Members of Parliament, and does not abridge or affect the ancient and essential privilege of freedom of speech in Parliament. The conclusion that this privilege, solemnly reasserted in the Bill of Rights, was within a few years abrogated or at least vitally impaired cannot lightly be reached.

The following sections of the Act of 1700 support, or at least do not militate against, the same view. The second section provides that the Act shall not extend to subject the person of any of the knights, citizens and burgesses of the House of Commons or any other person entitled to the privilege of Parliament to be arrested " during the time of privilege "—a significant phrase. Section 3 again emphasizes the temporal aspect of the impediment to a plaintiff pursuing his proper remedy by providing that, if he shall by reason of privilege of Parliament be stayed or prevented from prosecuting any suit by him commenced, he shall not for that reason be barred by any Statute of Limitation or nonsuited, dismissed, or his suit discontinued, but shall from time to time upon the rising of the Parliament be at liberty to proceed to judgment and execution. Section 4 makes special provision in regard to actions against the King's original and immediate debtors and other persons therein mentioned which do not appear to call for comment. Section 5 provides that neither that Act nor anything therein contained shall extend to give any jurisdiction, power or authority to any court to hold plea in any real or mixt action in any other manner than such court might have done before the making of that Act. Of this section it may be safely said that it does not touch the question of the privilege of freedom of speech in Parliament.

The Act of 1700 having been closely examined, the succeeding Acts can be briefly dealt with. An Act of 1703 (2 & 3 Anne, c. 18) entitled " An Act for the further explanation and regulation " of privilege of Parliament in relation to persons in public offices " throws no additional light on the scope of the earlier Act, nor does an Act of 1738 (11 Geo. 2, c. 24), which purported to do no more than amend the Act of 1700 by further curtailing the so-called time of privilege. An Act of 1763 (4 Geo. 3, c. 33) sufficiently indicates its purpose and effect by its title " An Act for preventing inconveniences arising in cases of merchants and such " other persons as are within the description of the Statutes " relating to bankrupts being entitled to privilege of Parliament, " and becoming insolvent." It is in no way relevant to the question that has to be determined. Finally comes the Act of 1770, the immediate subject of reference, and little remains to be said about it, for it is clear, as has already been stated, that it did not extend the ambit of section 1 of the Act of 1700, and that its only relevance is that it altogether abolished the time of privilege during which suits might not be commenced or prosecuted against Members of Parliament.

Their Lordships have already expressed their views upon the Act of 1700, and it follows that they must answer the question referred to them by saying that the House would not be acting contrary to the Parliamentary Privilege Act, 1770, if it treated the issue of a writ against a Member of Parliament in respect of a speech or proceeding by him in Parliament as a breach of its privileges. It is proper, however, that they should mention certain arguments that were addressed to them.

It is a commonplace in the interpretation of statutes that the court may be assisted by a consideration of the existing law at the time of the passing of the statute under review, and of the evil which it was designed to remedy. Accordingly, the Attorney-General, as he was well entitled to do, invited their Lordships to consider what was the law in regard to the issue of a writ against a Member of Parliament at the relevant date, which by common consent was the year 1700. Sir Frank Soskice, who assisted their Lordships by contending that the Act did not affect the privilege of freedom of speech, in effect made the same plea, for he opened his speech by asking that it should be decided, first, whether, if the 1770 Act and the earlier Acts had not been passed, the issue of a writ would in the circumstances mentioned in the reference be a breach of privilege, and, secondly, if the answer was in the affirmative, whether it was the effect of those Acts to prevent the issue of such a writ being any longer a breach. As a result of this approach to the construction of the Act of 1700 and, accordingly, of the Act of 1770, the argument on both sides ranged widely over the field of parliamentary privilege. In particular their Lordships were reminded of the manner in which from the earliest times the right of freedom of speech had been asserted. Strode's Act, passed in the fourth year of Henry VIII, was recalled, by which it was declared that all suits and proceedings against Richard Strode and against every other Member of the present Parliament or of any Parliament thereafter "for any "bill, speaking, or declaring of any matter concerning the Parlia-"ment to be communed and treated of, be utterly void and of "none effect." Nor was there any doubt that, though the form was new, this was but the assertion of an ancient privilege.

Then their Lordships were invited to examine, and examined, a large number of cases through the seventeenth and following centuries in which many aspects of privilege were discussed, but it did not appear to them that there was any authority relevant to the only question referred to them—viz., the meaning of the Act of 1770. For even if it is assumed, as the Attorney-General contended (and their Lordships do not pronounce upon it), that the mere issue of a writ for defamation in respect of a speech in Parliament is not a breach of privilege, the assumption does not assist his argument that the Act of 1770 is to be construed so as to cover suits against Members of Parliament in respect not only of their actions as individuals but also of their speeches in Parliament. Nor can it be relevant first to determine, as Sir Frank Soskice invited their Lordships to do, what would have been the state of the law if the Act of 1770 and the related Acts had not been passed. The single question is whether "the House "would be acting contrary to the Parliamentary Privilege Act, "1770, if it treated the issue of a writ against a Member of "Parliament in respect of a speech or proceeding by him in Par- "liament as a breach of its privileges." This question can, for the reasons already given, be answered by saying "No," without embarking upon a general consideration of parliamentary privilege.

Their Lordships repeat that they answer this and no other question. It was referred to them and it became their duty to answer it. But they do not intend expressly or by implication to pronounce upon any other question of law. In particular they express no opinion whether the proceedings referred to in the introductory paragraph were "a proceeding in Parliament," a question not discussed before them, nor on the question whether the mere issue of a writ would in any circumstances be a breach of privilege. In taking this course they have been mindful of the inalienable right of Her Majesty's subjects to have recourse to her courts of law for the remedy of their wrongs and would not prejudice the hearing of any cause in which a plaintiff sought relief. As was justly observed by the Select Committee of the House of Commons appointed in 1810 to consider the famous case of *Burdett* v. *Abbot* (see Hatsell's Parliamentary Precedents, vol. 1, at p. 293): "And it appears, that in the several instances "of actions commenced in breach of the privileges of this House, "the House has proceeded by commitment, not only against the "party, but against the solicitor and other persons concerned in "bringing such actions; but your committee think it right to "observe, that the commitment of such party, solicitor, or other "persons, would not necessarily stop the proceedings in such "action." This is an aspect of the matter which cannot be ignored, for in the words of Erskine May, Parliamentary Practice, 16th ed., p. 172: "The House of Commons . . . claims to be

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"the absolute and exclusive judge of its own privileges, and that "its judgments are not examinable by any other court or subject "to appeal. On the other hand, the courts regard the privileges "of Parliament as part of the law of the land, of which they are "bound to take judicial notice. They consider it their duty to "decide any question of privilege arising directly or indirectly "in a case which falls within their jurisdiction and to decide it "according to their own interpretation of the law. The decisions "of the courts are not accepted as binding by the House in "matters of privilege, nor the decisions of the House by the "courts. Thus the old dualism remains unresolved." An example of this dualism may be seen in the case of *Stockdale* v. *Hansard*[1] and the subsequent case of the *Sheriff of Middlesex*,[2] which are part of history.

In accordance with the views expressed above their Lordships humbly report to Her Majesty that the question referred to them should be answered in the negative.

Solicitors: *Treasury Solicitor; Sydney Morse & Co.*

C. C.

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[1] (1839) 9 Ad. & E. 1.

[2] (1840) 11 Ad. & E. 273.

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May 19.

TENNEKOON, COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS . . . . APPELLANT;

AND

DURAISAMY . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Privy Council—Leave to appeal—Jurisdiction of Commonwealth court—"Civil suit or action"—Ceylon—Order of Commissioner for Registration of Indian and Pakistani residents—Appeal to Supreme Court—Court's discretion to grant leave to appeal to Privy Council —Indian and Pakistani Residents (Citizenship) Act, No. 3 *of* 1949, *s.* 15*—Appeals (Privy Council) Ordinance (Legislative Enactments of Ceylon,* 1938, *c.* 85), *s.* 3, *Sch., r.* 1 (*b*)*—Ceylon Charter of Justice,* 1833, *s.* 52.

Ceylon—Citizenship—Indian resident—Intention to settle permanently in Ceylon—Proof—Indian and Pakistani Residents (Citizenship)

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* *Present*: Lord Morton of Henryton, Lord Tucker, Lord Cohen, Lord Denning and the Rt. Hon. L. M. D. de Silva.

Act, No. 3 *of* 1949 (*as amended by Indian and Pakistani Residents (Citizenship) (Amendment) Act, No.* 37 *of* 1950, *s.* 4), *s.* 22.

Conflict of Laws—Domicile—Change—Standard of proof—Difference between proving change of domicile and intention permanently to settle.

An appeal to the Supreme Court of Ceylon under section 15 of the Indian and Pakistani Residents (Citizenship) Act, 1949, from an order of the commissioner refusing or allowing an application for registration as a citizen of Ceylon is a "civil suit or action in "the Supreme Court" within the meaning of section 3 of the Appeals (Privy Council) Ordinance of Ceylon (c. 85 of the Legislative Enactments, 1938), which provides for appeals to the Privy Council by parties "to civil suits or actions in the Supreme Court," and accordingly an appeal from the Supreme Court's decision on appeal from the commissioner lay to the Privy Council in the discretion of the Supreme Court under rule 1 (*b*) in the Schedule to the Appeals (Privy Council) Ordinance where that court were of opinion that the question involved was "one which by reason of "its great general or public importance" ought to be submitted to the Board.

The words "civil suits or actions" in section 3 of the Appeals (Privy Council) Ordinance are not to be read as limited to a proceeding in which one party sues for or claims something from another in regular civil proceedings, but must bear the same meaning as they bore in section 52 of the Ceylon Charter of Justice of 1833, which was that every application to a court for relief or remedy through the exercise of the court's power or authority, or otherwise to invite its interference, constituted an action, for it would be difficult to imagine an intention to exclude from the range of permissible appeals under the Charter cases differentiated by reference to the form of the proceedings, regardless of the gravity of the result occasioned by them.

Commissioner of Stamps, Straits Settlements v. *Oei Tjong Swan* [1933] A.C. 378; 49 T.L.R. 428 followed.

Dictum of Basnayake J. in *Silverline Bus Co. Ltd.* v. *Kandy Omnibus Co. Ltd.* (1956) 58 N.L.R. 193, 213, that "civil suit or "action" in section 3 of the Appeals (Privy Council) Ordinance is limited to "a proceeding in which one party sues for or claims "something from another in regular civil proceedings," disapproved.

Decision of the Supreme Court of Ceylon affirmed.

The respondent, a married Indian resident in Ceylon, applied in 1951 under section 4 (1) of the Indian and Pakistani Residents (Citizenship) Act, 1949, to be registered as a citizen of Ceylon together with his family, stating in his application that he had been continuously resident in Ceylon during the requisite period prescribed by the Act. At an inquiry before a deputy commissioner the respondent, who was employed as head clerk on an estate, gave evidence, inter alia, that remittances he had made to his mother in India were made under an estate-group scheme and that on an official "B" form signed by him for that purpose he had declared himself to be "temporarily resident in Ceylon." The deputy commissioner, in his order refusing the respondent's application, said that the respondent's domicile of origin was India and that there was a presumption that the domicile continued unless the respondent had adopted a Ceylon domicile of choice; that the burden of proving that he had changed his Indian domicile and had "permanently settled in Ceylon" within the meaning of section 22 of the Act of 1949 lay on him, and that there was clear evidence that the presumption of continued Indian domicile had not been rebutted, since on his own admission, as declared on the "B" form, he was temporarily resident in Ceylon. An appeal by the respondent to the Supreme Court under section 15 was allowed, and against that decision the commissioner appealed:—

Held, that the Act made no reference to domicile, and the question of proving a change of domicile did not come into the matter at all. The Act placed on an applicant the burden of proving that at the time of his application he had an intention to settle permanently in Ceylon.[1] Apart from his signature on the "B" form no action of the respondent indicated that his residence in Ceylon was of a temporary nature; on the contrary, his conduct throughout pointed strongly to an intention to settle permanently in that country, and in those circumstances the deputy commissioner was not justified in treating the statement on the "B" form as a sufficient ground for refusing the application.

Dictum of Lord Buckmaster on "declarations as to intention" in *Ross* v. *Ross* [1930] A.C. 1, 6 applied.

Thomas v. *Commissioner for Registration of Indian and Pakistani Residents* (1953) 55 N.L.R. 40 approved.

Decision of the Supreme Court of Ceylon (sub nom. *Duraisamy* v. *Tennekoon, Commissioner for Registration of Indian and Pakistani Residents*) (1955) 56 N.L.R. 313 affirmed.

APPEAL (No. 18 of 1956) from a judgment of the Supreme Court of Ceylon (February 18, 1955), reversing an order (January 25, 1954) made by the appellant, the commissioner for the registration of Indian and Pakistani residents, refusing the respondent's application for the registration of himself, his wife and his four children as citizens of Ceylon.

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[1] In Privy Council Appeal No. 23 of 1956, which was heard together with the present appeal, and which the Supreme Court had treated as governed by this case, the commissioner had stated: "I am of opinion ". . . that what the Act requires is "that an applicant should have permanently settled in Ceylon not "merely by the date of his application, but at any rate by the date "of coming into operation of the Act, "namely, August 5, 1949." The Board, in the course of their judgment dismissing the commissioner's appeal, said: "In their Lordships' opinion "the provisions of the Act, and in "particular the use of the present "tense in section 6 (1), make it "reasonably clear that an applicant "must prove that he is 'an Indian "'or Pakistani resident,' as defined "in section 22, at the date of the "application. If the relevant date "had been the coming into operation "of the Act, there would surely have "been an express reference to that "date in section 6 (1)."

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: On March 29, 1951, the respondent (hereafter called " the applicant ") applied for registration as a citizen of Ceylon, under section 4 (1) of the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, hereafter referred to as " the Act." His application was refused by Mr. Adhihetty, one of the deputy commissioners, on January 25, 1954, but an appeal by the applicant to the Supreme Court of Ceylon was successful. The commissioner now appealed from the decision of the Supreme Court, with the leave of that court.

Before counsel for the commissioner opened the appeal, counsel for the applicant took a preliminary objection to the jurisdiction of the Board, on the ground that the Supreme Court had no power to give leave to appeal to Her Majesty in Council in this case. It was held that that objection failed, for reasons which are stated in the judgment of the Board.

The main question in the appeal was whether the deputy commissioner who dealt with this case was justified in holding that the applicant had failed to prove that he was " permanently " settled in Ceylon " within the meaning of section 22 of the Act (as amended by section 4 of the Indian and Pakistani Residents (Citizenship) (Amendment) Act, No. 37 of 1950).

The Act came into operation on August 5, 1949. It made provision for granting the status of a citizen of Ceylon to Indian and Pakistani residents in Ceylon who were possessed of a special residential qualification, upon the conditions and in the manner therein prescribed. The residential qualification was defined in section 3 as consisting of " uninterrupted residence in Ceylon " immediately prior to January 1, 1946, for a period of not less than 10 years (in the case of a single person) or seven years (in the case of a married person) combined with " uninterrupted residence in " Ceylon " from January 1, 1946, until the date of the application for registration. Continuity of residence was to be deemed to be uninterrupted by occasional absences from Ceylon not exceeding 12 months in duration on any one occasion. Section 4 of the Act provided that any Indian or Pakistani resident possessed of this residential qualification " may, irrespective of age or sex exercise " the privilege of procuring registration as a citizen of Ceylon for " himself or herself, and shall be entitled to make application " therefor " in the manner prescribed by the Act. The section

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further permitted the additional registration of wives and of dependent minor children ordinarily resident in Ceylon and, in certain defined circumstances, extended the privilege of procuring registration to widows and orphaned minor children of Indian or Pakistani residents.

Section 6 of the Act (as amended by section 3 of the said Act, No. 37 of 1950) provided as follows: " It shall be a condition for " allowing any application for registration under this Act that the " applicant shall have—(1) first proved that the applicant is an " Indian or Pakistani resident and as such entitled by virtue of " the provisions of sections 3 and 4 to exercise the privilege of " procuring such registration, or that the applicant is the widow " or orphaned minor child of an Indian or Pakistani resident and " as such entitled by virtue of those provisions to exercise the " extended privilege of procuring such registration; and (2) in " addition, except in the case of an applicant who is a minor " orphan under fourteen years of age, produced sufficient evidence " (whether as part of the application or at any subsequent inquiry " ordered under this Act) to satisfy the commissioner that the " following requirements are fulfilled in the case of the applicant, " namely—(i) that the applicant is possessed of an assured income " of a reasonable amount, or has some suitable business or " employment or other lawful means of livelihood, to support the " applicant and the applicant's dependants, if any; (ii) where " the applicant is a male married person (not being a married " person referred to in paragraph (*a*) of section 3 (2)), that his " wife has been ordinarily resident in Ceylon, and in addition, " that each minor child dependent on him was ordinarily resident " in Ceylon while being so dependent; (iii) that the applicant is " free from any disability or incapacity which may render it " difficult or impossible for the applicant to live in Ceylon according to the laws of Ceylon; (iv) that the applicant clearly " understands that, in the event of being registered as a citizen " of Ceylon—(*a*) the applicant will be deemed in law to have " renounced all rights to the civil and political status the applicant has had, or would, but for such registration in Ceylon have " had, under any law in force in the territory of origin of the " applicant or the applicant's parent, ancestor or husband, as the " case may be, and (*b*) in all matters relating to or connected " with status, personal rights and duties and property in Ceylon, " the applicant will be subject to the laws of Ceylon."

Section 22 of the Act (as amended by section 4 of the said Act, No. 37 of 1950) defined an " Indian or Pakistani resident " as "a person—(*a*) whose origin was in any territory which, "immediately prior to the passing of the Indian Independence "Act, 1947, of the Parliament of the United Kingdom, formed "part of British India or any Indian State, and (*b*) who has "emigrated therefrom and permanently settled in Ceylon, and "includes—(i) a descendant of any such person; and (ii) any "person permanently settled in Ceylon, who is a descendant of "a person whose origin was in any territory referred to in the "preceding paragraph (*a*); . . ."

The Act made provision for the appointment of an officer to be known as the Commissioner for the Registration of Indian and Pakistani Residents, of deputy commissioners and of investigating officers. Applications for registration were to be addressed to the commissioner or a deputy commissioner and were to be in a prescribed form containing all relevant particulars and supported by affidavit. Certified copies of documents might also be submitted. Each application was to be referred to an investigating officer for investigation and report, and the commissioner (or deputy commissioner) was to take such report into consideration in dealing with the application. Where he was of opinion that there was a prima facie case for allowing the application, he must give public notice that, in the absence of any written objection received by him within a month, an order allowing the application would be made, and, in the absence of any such objection, the application was to be allowed. If any objection was received, an inquiry into the nature of the objection was to be ordered.

Where the commissioner (or deputy commissioner) was of opinion that a prima facie case had not been established, he must serve on the applicant a notice setting out the grounds on which the application would be refused and giving the applicant an opportunity within three months to show cause to the contrary. If no cause was shown, an order refusing the application was made. If cause was shown, an inquiry was to be ordered, unless the commissioner (or deputy commissioner) took the steps he was authorized to take when there was a prima facie case for allowing an application (s. 9 (3)).

Such inquiry was to be conducted by the commissioner or a deputy commissioner, who was to have all the powers of a District Court to summon witnesses, compel the production of documents and administer oaths, but the proceedings were to be as far as possible "free from the formalities and technicalities of the rules "of procedure and evidence applicable to a court of law," and might be conducted "in any manner not inconsistent with the "principles of natural justice, which to him" (the commissioner or deputy commissioner) "may seem best adapted to elicit proof "concerning the matters that are investigated." At the close of such an inquiry the commissioner (or deputy commissioner) must either take the steps he was authorized to take whenever there was a prima facie case for allowing an application, or make an order refusing the application.

Section 15 of the Act provided that an appeal against an order refusing or allowing an application was to lie to the Supreme Court.

The applicant applied, on March 29, 1951, to be registered under the Act as a citizen of Ceylon together with his family, stating in his application that he was a married man, an Indian or Pakistani resident, had been continuously resident in Ceylon during the period of seven years commencing on January 1, 1939, and ending December 31, 1945, and from January 1, 1946, to the date of the application, and making a declaration in the terms of section 6 (2) (iii) and (iv) of the Act. In his supporting affidavit he deposed that he had been born in India on July 1, 1912, and had been married in April, 1932, and that he was employed as head clerk at Glentilt Estate, Maskeliya, having also a share of Rs.2,000 in boutique No. 13, Main Street, Maskeliya. In his covering letter he stated that he came to Ceylon in March, 1931, went back to India for his marriage in April, 1932, and returned to Ceylon with his wife in June, 1934, "from which time I am continually residing in Ceylon with my "wife and children. My four children are all born in Ceylon.

"During the above period of our stay in Ceylon, I had been to "India with my family to see my aged parents and relations on "four occasions and stayed in India not more than 15 days during "each trip, and we did not visit India during 1942–49."

The application was supported by a letter from one M. G. E. de Silva, a Justice of the Peace of Maskeliya, who wrote that from the year 1934 the applicant and his family had "been continually resident in Ceylon with the exception of short leaves "which amounted to not more than one month on each occasion."

In the course of the investigation, the applicant produced to the investigating officer a certificate dated August 18, 1951, from the Superintendent of Brunswick Group, Maskeliya, where he had been employed from September, 1934, to September, 1944, stating that "according to Mr. Duraisamy's statement, verified "by the Estate records, he and his family had been in continuous "residence on this estate, except for short visits to India for about "15 days once in two years."

On January 28, 1952, the applicant answered a questionnaire, stating that the only visit he, his wife and minor children had paid to India or Pakistan since January 1, 1936/January 1, 1939, was a visit to India in April, 1942, for one month to see his mother, and he further declared that he had remitted sums of Rs. 70 in May, June and July, 1951, to India for his mother. He subsequently stated, in answer to an inquiry from the office of the Commissioner for the Registration of Indian and Pakistani Residents, that these remittances were made under the estate-group scheme on special permit obtained from the Exchange Controller, Colombo, and that he had declared himself on the appropriate forms of application for this purpose, known as "B" forms, to be temporarily resident in Ceylon.

On September 9, 1952, R. T. Ratnatunga, a Deputy Commissioner for the Registration of Indian and Pakistani Residents, gave the applicant notice that he had decided to refuse his application for registration unless he showed cause to the contrary within a period of three months. The grounds for such refusal were specified as follows: "You have failed to prove that you had "permanently settled in Ceylon; the contrary is indicated by "the fact that, in seeking to remit money abroad, you declared "yourself to be temporarily resident in Ceylon."

The applicant replied on September 26, 1952, stating the purpose of the remittances to be for the maintenance of his mother and two invalid sisters, and requesting a reconsideration of his case. The deputy commissioner acknowledged this letter on October 9, 1952, and stated that an inquiry would be held under section 9 (3) of the Act.

At the inquiry, which was held on January 25, 1954, before V. D. Adhihetty, a deputy commissioner, the applicant gave evidence substantially confirming his personal history and circumstances as stated in his application. With regard to his visits to India he said that these were not correctly stated in the superintendent's certificate dated August 18, 1951. "The actual visits "I paid to India during this period are in June, 1939, May, 1942, "and September, 1949. From the time I came to Ceylon in "1939, I have paid six visits to India up to date."

As to the remittances to India, his evidence was as follows: "My mother and sister are dependent on me. From 1935 on-"wards I have been supporting my mother and sister. Before "the exchange control I used to send Rs. 25 per month for the "maintenance of my mother and sister. I applied to the Controller for a permit in December, 1949. The Controller sent me a general permit to the superintendent of the estate, and informed me that I had to remit money through the estate-group scheme. Under this permit I sent money to India through the estate-group scheme from March, 1950, about Rs. 50 a month. I had a renewal permit from April 7, 1951, authorizing me to send Rs. 70 a month. Under this permit I sent three sums of Rs. 70 a month in May, 1951, June, 1951, and in July, 1951. I signed 'B' forms under the estate-group scheme for the various sums I had remitted to India since 1950 through the estate-group scheme, and for each remittance I perfected a 'B' form wherein I made a declaration that I was temporarily resident in Ceylon. I ceased sending money from July, 1951, when I came to know definitely that remitting money will affect my citizenship rights through the estate-group scheme. It is a fact that I declared myself temporarily resident in Ceylon for the purpose of remitting money to India."

At the end of the inquiry the deputy commissioner made an order refusing the application, and the applicant appealed to the Supreme Court of Ceylon. The appeal was first argued before Fernando A.J., and that judge on August 6, 1954, reserved the case for the decision of two or more judges as the Chief Justice should determine.

On February 7 and 8, 1955, the appeal was heard by a bench consisting of Gratiaen J. and Sansoni J. On February 18, 1955, the court delivered judgment allowing the appeal with costs and directing the commissioner to take the appropriate steps under the Act on the basis that a prima facie case for registration had been established. The judges in giving their judgment said: "The main provisions of the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949 (hereinafter called 'the Act'), must now be examined with special reference to the qualifications prescribed for acquiring citizenship by registration. Bearing in mind the legislative plan as a whole, we conclude generally that the intention was to admit any Indian or Pakistani residing in Ceylon to the privilege of Ceylon citizenship (if claimed within a stipulated period of time) provided that he satisfied certain tests prescribed by statute for establishing that his association with the Island could not (or could not longer) be objected to as possessing a migratory or casual character. The main question before us relates to the meaning of the words 'permanently settled in Ceylon' in section 22 of the Act

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" (as amended by section 4 of Act No. 37 of 1950), which defines " an ' Indian or Pakistani resident.' "

After reading section 22 and dealing with an argument—not relied upon before the Board—as to the effect of the word " emigrate " in that section, the judges continued: " Section 6 " (1), read with section 22, directly raises the question whether " an applicant is ' permanently settled in Ceylon.' We therefore " propose to postpone our discussion of section 6 (1) until we have " first examined the other special qualifications and conditions " for registration prescribed by the Act: (1) the applicant must " possess a minimum qualification of ' uninterrupted residence ' " as defined in section 3; (2) his wife (if he is married) and his " minor dependent children (if any) must also possess certain " residential qualifications—section 6 (2) (ii) in its recently " amended form; (3) he must establish a reasonable degree of " financial stability—section 6 (2) (i); (4) he must be free from " any disability or incapacity of the kind referred to in section 6 " (2) (iii); (5) he must ' clearly understand ' the statutory consequence of registration—section 6 (2) (iv).

" One observes in all these requirements an underlying decision " to deny Ceylon citizenship to non-nationals whom Parliament " for one reason or another would consider unsuitable for that " privilege. Hence the insistence on the long and ' uninter" ' rupted residence ' of the applicant himself and on the residen" tial qualifications of his immediate family (if any) regarded as a " unit; and the further safeguard that his prospects of useful " citizenship were not likely to be endangered by poverty or other " handicaps. Each of these requirements, if satisfied, would " guarantee a more enduring quality to the tie between the new " citizen and the country which he has elected to adopt, ' for " ' better, for worse,' as his own."

Later, the judges observed: " An Indian or a Pakistani resid" ing in Ceylon is in our opinion entitled as of right to exercise the " privilege of being registered as a citizen of Ceylon if at the time " of his application (made within the requisite period of time) " (1) he and his family (if any) possess the residential qualifica" tions respectively prescribed for them by the Act, and he " demonstrates his intention to settle permanently in Ceylon by " electing irrevocably to apply for registration; and (2) he satisfies " all the other relevant conditions laid down in section 6 (2) of " the Act; and (3) the requirement as to ' origin ' in paragraph (*a*) " of the words of the definition is satisfied, or he is at least a " descendant of a person whose origin was as aforesaid."

1958. March 17, 18, 19, 20, 24 and 25. *Sir Frank Soskice Q.C.* and *Montague Solomon* for the appellant.

Walter Jayawardena and *Sirimevan Amerasinghe*, for the respondent, took a preliminary objection to the competency of the appeal. The judgment of the Supreme Court from which this appeal is sought to be taken was not given in a "civil suit "or action" within the meaning of those words in section 3 of the Appeals (Privy Council) Ordinance (Legislative Enactments of Ceylon, 1938, c. 85), which provides for "the right of parties "to civil suits or actions in the Supreme Court" to appeal to the Privy Council subject to specified rules. The words "civil "suit or action" first appeared in the Ceylon Charter of Justice of 1833. The application for registration as a citizen of Ceylon made by the respondent to the commissioner appointed under the Indian and Pakistani Residents (Citizenship) Act, 1949, was not a "suit or action" within the meaning of the Appeals (Privy Council) Ordinance, because the commissioner is not a court. The appeal to the Supreme Court under section 15 of the Act of 1949 from the decision of the commissioner is also not a "suit "or action" within the meaning of the Appeals Ordinance, because: (i) the Supreme Court, in entertaining the appeal, was not acting within its ordinary jurisdiction as defined by the Courts Ordinance (Legislative Enactments, c. 6); (ii) there is no claim against any person; there are no contending parties to the appeal; (iii) there is neither an action nor a cause of action within the meaning of the Courts Ordinance. Here the appeal is given simpliciter and there is no indication that any procedure that is usual in actions or applications in the Supreme Court should be followed. The definition in section 6 of the Civil Procedure Code "Every application to a court for relief or remedy through the "exercise of the court's power or authority, or otherwise to invite "its interference, constitutes an action" is not a general definition, but is one for the purposes of Chapter II of Part I, which deals with actions in general.

If, as was held in *Sockalingam Chetty* v. *Mani Kam*,[1] there is no right of appeal to the Privy Council from a judgment of the Supreme Court in insolvency proceedings on the ground that they do not come within "civil suit or action," neither does the present case. For there to be an appeal to the Privy Council the decision of the Supreme Court should be on appeal from a decision in an action instituted in the proper way in the District Court. The decision of the High Court in *Rangoon Botatoung Co.*

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[1] (1930) 32 N.L.R. 65.

Ltd. v. *The Collector, Rangoon*,[2] was not "a decree . . . made "in the course of its ordinary jurisdiction." In *Subramaniam Chetty* v. *Soysa*[3] it was said: "This application to the court to "set aside the sale instituted by a petition to the court was an "action within the meaning of" the Appeals (Privy Council) Ordinance, 1909. In the present case, however, there is not only the absence of any dispute or claim but the absence of any interest in the legal sense of any person. [Reference was made to *R.M.A.R.A.R.R.M.* v. *Commissioner of Income Tax*[4] and *Vander Poorten* v. *Settlement Officer*.[5]] In *Silverline Bus Co. Ltd.* v. *Kandy Omnibus Co. Ltd.*[6] Basnayake C.J. said that the words "civil suits or actions" in section 3 of the Appeals Ordinance meant "a proceeding in which one party sues for or claims "something from another in regular civil proceedings." That is correct, and this appeal is not properly before the Board. Special leave to appeal should not be granted at this stage.

Sir Frank Soskice Q.C. What the Board is being asked to construe are, it is submitted, the words "civil suit or action" as used in the original Charter of 1833. The argument for the respondent is designed to establish that some less extended meaning should be attributed to those words than prima facie they bear. They are as wide as they can possibly be, and unless there appears in the context something which requires the court to limit them they should be given their fair scope and meaning. A general description of "civil suit or action" is only to be found, it would appear, in *Clarke* v. *Bradlaugh*,[7] where it was said: "I am not sure that it would not be reasonable . . . to "hold that the word 'action' is a sort of nomen generale which "includes every sort of legal proceeding"; and in the House of Lords[8]: "I am also satisfied . . . that the word 'action' is . . . "a generic term," and[9]: "But in legal phraseology 'action' "includes every suit, whether by a subject, or in the name of "the Sovereign, or by an information by the Attorney-General "on behalf of the Crown." The effect of the House of Lords' decision is that if one finds the word "action," and a fortiori "civil suit or action," prima facie unless there is some clear indication of a context in which the word is used, what is contemplated is any approach by the subject to the courts for relief. It is the ordinary meaning. The Indian and Pakistani Residents

[2] (1912) L.R. 39 I.A. 197, 201.
[3] (1923) 25 N.L.R. 344, 349.
[4] (1935) 37 N.L.R. 447.
[5] (1946) 47 N.L.R. 217.
[6] (1956) 58 N.L.R. 193, 213.
[7] (1881) 7 Q.B.D. 38, 50.
[8] (1883) 8 App.Cas. 354, 361.
[9] Ibid. 374.

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(Citizenship) Act, 1949, confers a right on an Indian or Pakistani if he complies with the provisions. There is no trace of any administrative proceeding or discretion there; he has an absolute and indefeasible right given to him by the statute if he proves what the Act prescribes. If he is refused that right, he suffers a wrong, and he approaches the Supreme Court to redress the wrong. If the definition of " action " in section 5 of the Civil Procedure Code—" a proceeding for the prevention or redress of " a wrong "—limits the scope of the words used in the Charter, then this case comes directly within the definition. If it is coterminous with the words of the Charter, then one looks at the Charter. This is an action if it is not a suit.

In *Hansraj Gupta* v. *Official Liquidators, Dehra Dun-Mussoorie Electric Tramway Co. Ltd.*[10] the Board said that the word " suit " ordinarily means " a civil proceeding instituted by the " presentation of a plaint." That only deals with " suit " and to that extent is prima facie against the present appellant. Sections 5 and 6 of the Civil Procedure Code being side by side, and the first being a definition section, must be interpreted so as to include everything which section 6 says is an action, namely, " every application to a court for relief or remedy through the " exercise of the court's power or authority, or otherwise to invite " its interference." With regard to section 53 of the Charter of 1833, " decree " is appropriate to both civil and criminal jurisdictions. The judgments in the *Silverline* case[11] do not go into any discussion of the problem of what is a civil suit or action. *Soertsz* v. *Colombo Municipal Council*[12] is considering a point which does not arise in the present case, and it does not consider whether there is a civil suit or action within the meaning of section 3 of the Appeals Ordinance. A similar point is made on *Sockalingam Chetty* v. *Mani Kam.*[13] [Reference was also made to *R.M.A.R.A.R.R.M.* v. *Commissioner of Income Tax,*[14] *Settlement Officer* v. *Vander Poorten*[15] and *Subramaniam Chetty* v. *Soysa.*[16]]

In *Commissioner of Stamps, Straits Settlements* v. *Oei Tjong Swan*[17] it was said in the judgment of the Board: " The " decision against which the commissioner sought to obtain leave " to appeal was in their Lordships' view not a mere award of an

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[10] (1932) L.R. 60 I.A. 13, 19.
[11] 58 N.L.R. 193.
[12] (1930) 32 N.L.R. 62.
[13] 32 N.L.R. 65.
[14] 37 N.L.R. 447.
[15] (1942) 43 N.L.R. 436.
[16] 25 N.L.R. 344.
[17] [1933] A.C. 378, 393; 49 T.L.R. 428.

"administrative character but a judgment or determination made "by the court in a civil cause within the meaning of the Charter" (the Colonial Charter of 1855, in which the words "civil cause" appear). There is no difference between civil cause and civil action, and that passage is directly applicable. If the Board think that the reasoning of Basnayake C.J. in the *Silverline* case [18] as to the meaning of "civil suit or action" was mistaken, they should not hesitate to overrule it now. Again, in *In re W. Carter Smith; Ex parte Commissioner of Taxation* [19] it was said: "Whatever the popular signification of the word 'action' "may be, it is clear . . . that in its proper legal sense it is a "generic term, or nomen generale, and includes every sort of "legal proceeding." The Board should adopt the reasoning in the dissenting judgment of Sansoni J. in the *Silverline* case,[20] and, relating what he says to the present case, this case is within the Charter of 1833, s. 52, because the words "civil suit or "action" are used in their primary straightforward sense. The word "action" is used generally to indicate and comprehend any procedure of a legal character by which a subject approaches the court and asks the court to intervene in his favour. The present case is well within the ambit of section 52 of the Charter.

Jayawardena in reply. The reasoning in *Subramaniam Chetty* v. *Soysa* [21] is not applicable to the present case.

LORD MORTON OF HENRYTON. In their Lordships' view the preliminary point fails. They will give their reasons later.

Sir Frank Soskice Q.C. The issue in this case is whether the Supreme Court correctly construed the Indian and Pakistani Residents (Citizenship) Act, 1949, as amended. The cardinal point of reasoning in their judgment is, it is submitted, that once it has been shown that the necessary residential qualifications specified in section 3 and the conditions in sub-paragraphs (i), (ii), (iii) and (iv) of subsection (2) of section 6 are satisfied, it is not necessary to go on to consider the question of fact whether the applicant is permanently settled in Ceylon, because the necessary result of the qualifying conditions being fulfilled is that the applicant must be permanently settled in Ceylon. That view of the Supreme Court is wrong. In each case all the circumstances have to be looked at. The whole basis of the Supreme Court's judgment is that the judges are saying that the objects and tests which are laid down relieve the commissioner of the burden of considering the intention of the applicant. On the clear wording of the Act, that is not a legitimate approach. It must be established by the applicant affirmatively that he possesses the requisite intention to settle permanently in Ceylon. As to "intention," see *Bowie or Ramsay* v. *Liverpool Royal Infirmary.*[22] Having regard to the declarations made by the respondent to the Controller of Exchange that he was temporarily resident in Ceylon, he cannot in these proceedings be heard to say in contradiction of such declarations that he is permanently settled in Ceylon. He cannot both approbate and reprobate. The doctrine of approbation and reprobation was considered in *Verschurcs Creameries Ltd.* v. *Hull and Netherlands Steamship Co. Ltd.*[23] and *Lissenden* v. *C.A.V. Bosch Ltd.*[24] The respondent failed to prove that he is permanently settled in Ceylon within the meaning of section 22 of the Act of 1949 as amended, and, on the evidence before him, the deputy commissioner's findings ought not to be disturbed: *Watt or Thomas* v. *Thomas.*[25]

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[18] 58 N.L.R. 193, 213.
[19] (1908) 8 N.S.W., S.R. 246, 249.
[20] 58 N.L.R. 193, 214.
[21] 25 N.L.R. 344.

Solomon following. Formal declarations of intention such as those made by the respondent for the purposes of obtaining permits from the controller are of value and great weight should be attached to them in ascertaining what in fact his intention was. The commissioner was entitled to treat the formal declaration as an indication of what the respondent's intention was: *D'Etchegoyen* v. *D'Etchegoyen*[26]; *Gulbenkian* v. *Gulbenkian.*[27]

Jayawardena. There are two questions on the construction of section 22 of the Act of 1949 as amended: (1) What is the meaning of the words "permanently settled" in the context of the Act. (2) Whether, on a proper interpretation of the Act, a solemn declaration made by the applicant in statutory form, coupled with an intention which forms part of the statutory form, and his conduct in prosecuting the application for registration, do not constitute sufficient and necessary proof of the mental element involved in the words "permanently settled."

As to (1) (supra), it is clear that whatever may or may not be the exact meaning of "permanently settled," it does not mean domicile. The whole matter before the commissioner, however, was decided on the basis that the burden was on the applicant to prove a change of domicile—from the domicile of

[22] [1930] A.C. 588; 46 T.L.R. 465.

[23] [1921] 2 K.B. 608, 611.

[24] [1940] A.C. 412; 56 T.L.R. 347; [1940] 1 All E.R. 425.

[25] [1947] A.C. 484; 63 T.L.R. 314; [1947] 1 All E.R. 582.

[26] (1883) 13 P.D. 132.

[27] [1937] 4 All E.R. 618.

origin, India, to the domicile of Ceylon. It must be presumed that the legislature was aware of the concept of domicile, and that if it had intended domicile as a test the easy and most natural thing would have been to say so. "Permanent settle-" ment" does not have the same quality as "domicile." As to intention to change domicile, and the onus of proof, see *Winans* v. *Attorney-General*[28] and Cheshire, Private International Law, 4th ed., p. 155. If the meaning and connotation of the words "permanently settled" is not the same as that of "domicile," then the attitude taken by the commissioner cannot be correct. *Wahl* v. *Attorney-General*[29] again shows that "permanently" settled" and "domiciled" are different things. The legislature has established conditions from which there is a presumption of permanent settlement. Section 6 (2) (iv) of the Act contemplates a change of domicile from that of origin to that of Ceylon only on the applicant's being registered. The effect of registration is (a) that he is deemed to renounce his political status, and (b) his civil status.

With regard to question (2) (supra), the mental attitude is best proved by an honest and serious declaration at the relevant time: *Winans* v. *Attorney-General*[30]; *Douglas* v. *Douglas*.[31] Here the mental element involved in permanent settlement is proved by the fact that the respondent has applied for registration under the Act with knowledge of the implications of such registration. Long residence and residence accompanied by the wife are corroboration of the declaration of intention. Further, applications under the Act can be granted without an inquiry, that is to say, the legislature contemplated that applications complying with the conditions were sufficient for allowing them. A large number of applications must have been contemplated by the legislature, and they had to be decided within a reasonable time. The legislature intended that the application and long residence and the affidavit should be sufficient. The cases on declaration of intention do not take the matter further: *Ross* v. *Ross*,[32] *Hodgson* v. *De Beauchesne*[33] and *Stanley* v. *Bernes*.[34] Reliance is placed on *Thomas* v. *Commissioner for Registration of Indian and Pakistani Residents*[35]—also a "B" form case; see also *Poravia Pillai* v. *Commissioner for Registration of Indian and Pakistani Residents*.[36] The respondent's statement that he

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[28] [1904] A.C. 287; 20 T.L.R. 510.
[29] (1932) 147 L.T. 382.
[30] [1904] A.C. 287.
[31] (1871) L.R. 12 Eq. 617.
[32] [1930] A.C. 1.
[33] (1858) 12 Moo.P.C. 285.
[34] (1830) 3 Hagg.Ecc. 373.
[35] (1953) 55 N.L.R. 40.
[36] (1953) 54 N.L.R. 407.

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was temporarily resident in Ceylon is not conclusive and carries little weight when viewed against all the circumstances proved in his favour.

Sir Frank Soskice Q.C. in reply. There is no material before the Board on which it can be said that the commissioner did not discharge his functions properly and judicially; if that is right, then there was no material on which the Supreme Court could allow the appeal from his decision, and consequently the present appeal should be allowed and the commissioner's decision restored. Alternatively, the Board should send the matter back, not to the Supreme Court but to the commissioner, being the tribunal of fact to weigh the conflicting evidence.

It may be that the requirements to establish permanent settlement are more exacting than those which are necessary to establish the acquisition of domicile of choice. Settlement must be permanent; in the case of domicile of choice, however, there is a good deal of judicial authority for the proposition that it is sufficient to establish intended domicile; that is, the intention to take up residence for an indefinite period. If there is a distinction between "indefinite" and "permanent," then "permanent" is more exacting: *In re Craignish*[37]; *In re Annesley*[38]; *Gulbenkian* v. *Gulbenkian*.[39] It is submitted that the legislature sought to copy the somewhat technical rule which applies under the ordinary law in relation to domicile of choice and to incorporate that in the relevant provisions of the Act of 1949. Supposing that the respondent can establish that there is some difference between the burden of proof applicable in the case of domicile of choice and the burden of proof which is set up under section 6 of the Act of 1949 in the case of permanent settlement, what is the result? The respondent said that the burden of proof is different and that the commissioner ought to have approached the case on the basis that he had to look at the burden of proof under section 6, not the burden of proof appropriate to domicile of choice, and he said that if the commissioner had not approached the matter in that way his answer *might* have been different. The respondent surely has to establish that the answer *would have been* different. It is not conceded, however, that there is a difference in the burden; what is the difference? How can it be measured?

The Government of Ceylon are content to waive any claim to costs if they are successful.

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[37] [1892] 3 Ch. 180; 8 T.L.R. 205; 451.

[38] [1926] 1 Ch. 692; 42 T.L.R. 584.

[39] [1937] 4 All E.R. 618.

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May 19. The judgment of their Lordships was delivered by LORD MORTON OF HENRYTON, who stated the facts and statutory provisions set out above and continued: Their Lordships agree with the last passages they have quoted from the judgment of the Supreme Court, subject to one qualification. They think that the Supreme Court has gone too far in using the words " entitled " as of right." Section 6 (1) of the Act, read with section 22, places upon the applicant for registration the burden of proving that he has " permanently settled in Ceylon," and " in addition," of proving the matters set out in section 6 (2). In order to discharge this burden of proof he must supply evidence that at the time of his application he has the intention of settling permanently in Ceylon. It would appear from the passage just quoted that in the opinion of the Supreme Court an applicant provides *conclusive* evidence of this intention if, having satisfied all the other conditions laid down in the Act, he " demonstrates " it by electing irrevocably to apply for registration. Their Lordships would agree at once that this election, combined with the long and continuous residence in Ceylon which the Act prescribes, and supported as it must be by an affidavit, affords strong evidence that an applicant has permanently settled in Ceylon. The decision to apply for citizenship is one of great importance, especially as it would appear to preclude the applicant from ever thereafter obtaining Indian citizenship—(see section 5 (3) of the Indian Citizenship Act, 1955, and compare section 11 of that Act), and the commissioner should certainly attach great weight to the fact that the applicant has satisfied the conditions set out in paragraphs (1), (2) and (3) in the passage just quoted from the judgment. This fact, taken by itself, is sufficient in their Lordships' opinion to discharge the initial burden of proof which lies upon the applicant and to establish a prima facie case for registration as a citizen of Ceylon; but they cannot find that this fact precludes the commissioner from coming to a decision, after considering all relevant matters, that at the time of his application the applicant had not a genuine intention to settle permanently in Ceylon.

Their Lordships are, however, of opinion that the Supreme Court was clearly right in allowing the appeal of the applicant from the decision of the deputy commissioner.

It is plain, from the notice of September 9, 1952, already quoted, and from the terms of the order of January 25, 1954, that the deputy commissioner based his refusal of the application entirely upon his view that the applicant had failed to prove that he had permanently settled in Ceylon. In their Lordships' view the approach of the deputy commissioner to the determination of this question was wrong in two important respects.

First, he said in the course of his order: "Applicant's domicile "of origin is clearly India and there is a presumption that this "domicile continues, unless the applicant has adopted a Ceylon "domicile of choice, that is, in other words, he had permanently "settled in Ceylon. The burden of proof that he had changed "his Indian domicile or, in other words, that he had permanently "settled in Ceylon as required by section 6 read with section 22 "of the Act, lies on him."

Their Lordships do not regard the question of proving a "change of domicile" as coming into the matter at all. The burden of proving a change of domicile is indeed a heavy one, as is illustrated by the case of *Winans* v. *Attorney-General* [1] and many other cases. The Act has made no reference to domicile, but has placed upon the applicant the burden of proving that at the time of his application he had an intention to settle permanently in Ceylon. Their Lordships have already expressed their view as to the manner in which that burden of proof can be discharged. They think it likely that the legislature deliberately refrained from any reference to change of domicile, in order to free the commissioner or deputy commissioner (who may not be a lawyer) from the responsibility of investigating a question which, as the judges of the Supreme Court observed, "in most cases "would present formidable obstacles even to an experienced judge "trained in the law."

Secondly, the deputy commissioner concluded his order by saying: "the applicant has admitted that he has made several "remittances to India from March, 1950, to July, 1951, through "the estate-group scheme by perfecting 'B' forms wherein he "declared that he was temporarily resident in Ceylon. The "applicant is an educated man and he knew the implications of "declaring that he was temporarily resident in Ceylon. There "is clear evidence that the presumption referred to above has not "been rebutted. On his own admission he was temporarily "resident in Ceylon at the date of his application. The applica- "tion is therefore refused."

In *Ross* v. *Ross* [2] Lord Buckmaster observed: "Declarations "as to intention are rightly regarded in determining the question

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[1] [1904] A.C. 287; 20 T.L.R. 510.

[2] [1930] A.C. 1, 6.

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"of a change of domicile, but they must be examined by considering the person to whom, the purposes for which, and the circumstances in which they are made and they must further be fortified and carried into effect by conduct and action consistent with the declared expression."

In the present case the purpose for which the applicant signed form "B" is beyond doubt. His mother and crippled sisters were resident in India and dependent on him. He found that under the estate-group scheme there would be difficulties in sending remittances to these relatives if he stated in form "B" that he was permanently resident in Ceylon. Therefore, to quote his evidence, "for each remittance I perfected a 'B' form wherein I made a declaration that I was temporarily resident in Ceylon . . . it is a fact that I declared myself temporarily resident in Ceylon for the purpose of remitting money to India."

In their Lordships' view documents signed in these circumstances and for this purpose were of little evidential value for the purpose of determining the question before the deputy commissioner, especially as they were not "fortified and carried into effect by conduct and action consistent with the declared expression." Apart from the signature of the "B" forms no action of the applicant indicated that his residence in Ceylon was of a temporary nature. On the contrary, his conduct throughout pointed strongly to an intention to settle permanently in that country. In these circumstances the deputy commissioner was not justified in treating the statement made on the "B" forms as a sufficient ground for refusing the application. Their Lordships agree with the realistic view taken in similar circumstances by Nagalingam A.C.J. in the case of *Thomas* v. *Commissioner for Registration of Indian and Pakistani Residents.*[3]

For these reasons the decision of the deputy commissioner cannot stand, and the order made by the Supreme Court should be upheld.

Their Lordships now turn to the preliminary objection to their jurisdiction, already mentioned. This objection was based on The Appeals (Privy Council) Ordinance of Ceylon (cap. 85, vol. II, Legislative Enactments of Ceylon, p. 420), hereafter referred to as "The Appeals Ordinance," the relevant parts whereof are the following:

"3. From and after the commencement of this Ordinance the right of parties to civil suits or actions in the Supreme Court

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[3] (1953) 55 N.L.R. 40.

"to appeal to His Majesty in Council against the judgments and "orders of such court shall be subject to and regulated by— "(*a*) the limitations and conditions prescribed by the Rules set "out in the Schedule, or by such other Rules as may from time "to time be made by His Majesty in Council; and (*b*) such "general Rules and Orders of Court as the judges of the Supreme "Court may from time to time make in exercise of any power "conferred upon them by any enactment for the time being in "force." And

"Rule 1. Subject to the provisions of these rules, an appeal "shall lie—(*a*) as of right, from any final judgment of the "court, where the matter in dispute on the appeal amounts to "or is of the value of five thousand rupees or upwards, or where "the appeal involves directly or indirectly some claim or question "to or respecting property or some civil right amounting to or "of the value of five thousand rupees or upwards; and (*b*) at the "discretion of the court, from any other judgment of the court, "whether final or interlocutory, if, in the opinion of the court, "the question involved in the appeal is one which, by reason of "its great general or public importance or otherwise, ought to be "submitted to His Majesty in Council for decision."

The Supreme Court granted leave to appeal to the Privy Council on the ground that its decision involved a question of "great general or public importance" within the meaning of rule 1 (*b*). It was conceded before the Supreme Court by the respondent that a question of "great general or public import-"ance" was involved, but it was argued that no appeal lay from its judgment, on the ground that an appeal to the Supreme Court under section 15 of the Indian and Pakistani Residents Citizenship Act was not a "civil suit or action in the Supreme Court" within the meaning of section 3 of the Appeals Ordinance. The Supreme Court did not accept this argument. The Acting Chief Justice referred to two conflicting lines of decision and allowed the application with some hesitation, observing that "the question that "arises for decision is admittedly one which by reason of its great "importance should be submitted to Her Majesty in Council for "decision." Gratiaen J. said that "it may be conceded that "the proceedings" before the deputy commissioner "did not at "that stage constitute a 'civil suit or action'" but "had no "hesitation in reaching the conclusion that the parties to the "appeal were parties to a 'civil suit or action in the Supreme "'Court.'"

It was argued before their Lordships that the judges of the Supreme Court were wrong, that they had not power to grant leave to appeal, and that consequently their Lordships had no jurisdiction to hear the appeal, unless and until an application to Her Majesty for special leave to appeal was successfully made. It is thus necessary to examine whether the proceedings before the Supreme Court were a "civil suit or action" within the meaning of section 3. There has been a conflict of authority in Ceylon upon the point.

The words "civil suit or action" first occur in section 52 of the Charter of 1833, which conferred on the subject a right to appeal to the Sovereign. It is in the following terms: "52. And "We do further grant, ordain, direct, and appoint that it shall be "lawful for any person or persons being a party or parties to any "civil suit or action depending in the said Supreme Court to "appeal to Us Our heirs and successors in Our or Their Privy "Council against any final judgment, decree, or sentence, or "against any rule or order made in any such civil suit or action, "and having the effect of a final or definitive sentence, and which "appeals shall be made subject to the rules and limitations "following."

There follow a number of rules and limitations designed, among other things, to exclude cases considered of insufficient importance to be the subject-matter of an appeal to the Privy Council. It is to be observed that the section enabled a person, subject to these rules and limitations, to appeal as of right to the Sovereign. Section 53, which their Lordships think unnecessary to set out here, preserved intact the right of the Sovereign to admit appeals from the subject even where the subject could not appeal as of right.

It was argued before the Supreme Court and their Lordships that a civil suit or action means a proceeding in which one party sues for or claims something from another. No doubt the words are properly applicable to such cases, and they are the cases to which the words are most frequently applied. But it is necessary to inquire whether the application of the words as they appear in section 52 of the Charter must be limited to such cases. Their Lordships would make the general observation that section 52 of the Charter was granting to a subject labouring under a sense of grievance the fundamental right of appealing to the Sovereign and that, though it would be natural to exclude from the range of permissible appeals cases of insufficient importance, it would be difficult to imagine an intention to exclude cases differentiated by reference to the form of the proceedings, regardless of the gravity of the result occasioned by them. And as section 3 of the Appeals Ordinance sets out the manner in which "the right of parties to civil suits or actions in the Supreme Court "to appeal to His Majesty in Council" is to be regulated, their Lordships do not doubt that the words "civil suits or actions" must be given the meaning which they bore in the Charter of 1833.

The meaning of the words "civil cause" was considered by the Board in the case of *Commissioner of Stamps, Straits Settlements* v. *Oei Tjong Swan*.[4] The Commissioner of Stamps, under an ordinance of the Straits Settlements, had certified the amount of duty payable on the estate of a deceased person. The executor of the deceased appealed to the Supreme Court against the commissioner's decision and succeeded. An appeal by the commissioner to the Court of Appeal was dismissed. The commissioner applied to the Court of Appeal for leave to appeal to His Majesty in Council but leave was refused on the ground that it was not competent to that court to grant leave. Their Lordships' Board held that this last decision was wrong, and that under the law of the Straits Settlements it was competent for the Court of Appeal to grant leave to appeal. In arriving at a decision the Colonial Charter of 1855 came under their Lordships' consideration. Section 58 is to the following effect: "58. And we do "hereby further ordain, that if the East-India Company or any "person or persons, shall find him, her, or themselves aggrieved "by any judgment, decree, order, or rule of the Court of Judica-"ture of Prince of Wales' Island, Singapore, and Malacca, in any "case whatsoever, it shall be lawful for him, her, or them to "appeal to us, our heirs, or successors, in our Privy Council, in "such manner, and under such restrictions and qualifications, as "are hereinafter mentioned; that is to say, in all judgments, "decrees, or determinations made by the said Court of Judicature "in any civil cause, the party or parties against whom or to "whose immediate prejudice the said judgment, decree, or deter-"mination shall be or tend, may by his or their petition, to be "preferred for that purpose to the said Court, pray leave to "appeal to us, our heirs or successors, in our Privy Council, "stating in such petition the cause or causes of appeal"; then follow some provisions as to stay of execution and security for costs; and finally, upon such provisions being satisfied, the

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[4] [1933] A.C. 378; 49 T.L.R. 428.

"party or parties so thinking him, her or themselves to be "aggrieved shall be at liberty to prefer and prosecute" the appeal.

Lord Macmillan, delivering the judgment of the Board, said [5]: "It is true that the Ordinance in section 80 which deals with "appeals from decisions of the commissioner does not confer a "right of appeal to His Majesty in Council. But the Colonial "Charter of 1855 provides for leave to appeal being granted by "the court of the Colony from 'all judgments, decrees or deter-"'minations made by the said Court of Judicature in any civil "'cause.' And section 1154 of the Civil Procedure Code pro-"vides that subject to certain conditions 'an appeal shall lie from "'the Court of Appeal to His Majesty in Council (*a*) from any "'final judgment or order.' Wider language it would be difficult "to imagine. Their Lordships do not think it necessary to repeat "the reasons adduced by the Chief Justice against excluding the "decision of the Appeal Court in the present instance from the "scope of these provisions and content themselves with express-"ing their agreement. The decision against which the commis-"sioner sought to obtain leave to appeal was in their Lordships' "view not a mere award of an administrative character but a "judgment or determination made by the court in a civil cause "within the meaning of the Charter and a final judgment or order "within the meaning of section 1154 of the Civil Procedure Code, "and as such the court could competently have granted leave to "appeal from it to His Majesty in Council."

Their Lordships interpret the words "wider language it would "be difficult to imagine" as applying both to the Charter of 1855 and to section 1154 of the Civil Procedure Code.

The Board was then considering the words "civil cause," but their Lordships see no good ground for drawing any distinction between these words and "civil action." They agree with the observations just quoted, and they see no good ground for distinguishing the present case from the case just cited. They propose to follow that case, although the decision was arrived at without the assistance of argument by counsel, and to hold that the Supreme Court had power to grant leave to appeal in the present case. The preliminary objection therefore fails.

Reference was made in the course of the argument to the definition of the word "action" in the Courts Ordinance (cap. 6, Legislative Enactments of Ceylon, Vol. I, p. 25), and in the

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[5] [1933] A.C. 378, 392.

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Civil Procedure Code (cap. 86, Legislative Enactments of Ceylon. Vol. II, p. 428), both of which are earlier in date than the Appeals Ordinance. In each of these earlier Ordinances "action" is defined to mean "a proceeding for the prevention or redress of a "wrong." It was argued that the order of the deputy commissioner could not be said to be a wrong in the sense that a tort or a breach of contract can be said to be a wrong, as there was nothing illegal in the action of the deputy commissioner. On the other hand, it was argued that the word "wrong" in the definition has a wider connotation and would include the consequence of an order made by a commissioner which is wrong though legally made. It is not necessary for their Lordships to decide the point. The Charter was granted long before the two Ordinances mentioned were enacted and, as their Lordships have already pointed out, the words "civil suits or actions" in the Privy Council Appeals Ordinance must bear the same meaning as they bore in the Charter.

In addition to the definition of "action" (contained in section 5) mentioned above the Civil Procedure Code contains the following in section 6: "6. Every application to a court for relief "or remedy through the exercise of the court's power or autho-"rity, or otherwise to invite its interference, constitutes an "action." This is what their Lordships think is the meaning of "action" in the Charter and in the Appeals Ordinance though, as will have been seen, they do not found their decision on this section.

After the application for leave to appeal to the Privy Council had been granted in the present case a bench of five judges (one of whom dissented) in the case of *Silverline Bus Co. Ltd.* v. *Kandy Omnibus Co. Ltd.*,[6] after a very full and careful review of two conflicting lines of authority, decided that an application to the Supreme Court for a writ of certiorari was not a "civil suit "or action" within the meaning of section 3 of the Appeals Ordinance. Counsel for the commissioner in the present case did not contend that the decision in the *Silverline* case [6] was wrong: the point actually decided is not before their Lordships, and they have heard no argument upon it. It follows, however, from the views which they have already expressed that they cannot accept the view of Basnayake C.J. that the words "civil suit or action" in section 3 of the Appeals Ordinance should be limited to "a

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[6] (1956) 58 N.L.R. 193, 213.

"proceeding in which one party sues for or claims something "from another in regular civil proceedings."

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs of this appeal.

Solicitors: *T. L. Wilson & Co.; Smiles & Co.*

C. C.

[HOUSE OF LORDS.]

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July 16, 17, 18, 22;
Nov. 7.

RAHIMTOOLA . . . . APPELLANT;

AND

NIZAM OF HYDERABAD AND ANOTHER . RESPONDENTS.

Conflict of Laws—Sovereign immunity—Foreign State not a party to proceedings—Impleading foreign sovereign—Money belonging to one sovereign transferred to defendant servant of another foreign sovereign—Transfer by person entitled to operate bank account—No authority to transfer—Action to recover money—Claim that foreign sovereign impleaded or property of foreign sovereign affected—Scope of doctrine of immunity—Application of debt.

Agency—Accountability of agent to principal—Money paid to agent under mistake or wrongfully.

Trust—Sole beneficiary—Direction by beneficiary.

Judicial Precedent—Counsel, cases not cited by—Judgment based on—How far binding.

In 1948, when Indian troops were invading Hyderabad, money standing in the account of the Nizam and his Government at an English bank was transferred without authority by M. (one of the persons entitled to operate the account) into the name of R. (then High Commissioner for Pakistan in the United Kingdom), who received it on the instructions of the Foreign Minister of Pakistan. The Nizam and his Government brought an action against R. and the bank, claiming the money as money had and received to their use. R. asked that the writ in the action be set aside as against him and that the proceedings be stayed as against the bank on the ground that the action sought to implead a foreign sovereign, Pakistan, or sought to interfere with the right or interest of the Government of Pakistan in the money. It was conceded that R. had not established any equitable title to the money and the claim to immunity

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* *Present:* VISCOUNT SIMONDS, LORD REID, LORD COHEN, LORD SOMERVELL OF HARROW and LORD DENNING.

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was based on the fact that the legal title to the debt was vested in him as High Commissioner for Pakistan:—

Held, that the writs should be set aside against R. and the proceedings stayed against the bank notwithstanding that the money was paid to R. wrongfully or by a mistake of fact, for R. was the agent of the Sovereign State of Pakistan which had the legal title to the subject-matter of the action and the right to sue the bank for it.

Per Viscount Simonds. Cases where there was a claim by a foreign sovereign to a trust fund or a share thereof were distinguishable, since here there was no trust fund which was being administered by the court; the Sovereign State had never admitted that it was a trustee for the Nizam and that could not be established without impleading the foreign sovereign.

Per Lord Reid and Lord Somervell of Harrow. Those cases had no application to a case where the trustee was the sovereign himself.

Per Lord Denning. Sovereign immunity should not depend on whether a foreign Government is impleaded, directly or indirectly, but on the nature of the dispute. If the dispute brings into question the legislative or international transactions of a foreign Government or the policy of its executive, immunity from process should be granted, but if the dispute concerns the commercial transactions of a foreign Government and arises properly within the territorial jurisdiction of our courts, immunity should not be granted.

Per alios. We must not be taken as assenting to the views of Lord Denning upon a number of questions and authorities in regard to which the House has not had the benefit of the arguments of counsel or of the judgments of the courts below.

United States of America v. *Dollfus Mieg et Cie S.A.* [1952] A.C. 582; [1952] 1 T.L.R. 541; [1952] 1 All E.R. 572 applied.

Buller v. *Harrison* (1777) 2 Cowp. 565 and *Duke of Brunswick* v. *King of Hanover* (1844) 6 Beav. 1 distinguished.

Decision of the Court of Appeal (sub nom. *Nizam of Hyderabad* v. *Jung*) [1957] Ch. 185; [1957] 1 All E.R. 257 reversed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Birkett and Romer L.JJ.).

This was an appeal from an order of the Court of Appeal dated December 20, 1956, allowing an appeal by the respondent, the Nizam of Hyderabad, from an order dated July 30, 1956, of Upjohn J. whereby, on the motion of the appellant, Habib Ibrahim Rahimtoola, he ordered (1) that the writ of summons and the concurrent writ of summons and all subsequent proceedings in the action should be set aside as against the appellant; (2) that all further proceedings in the action should be stayed as against the second respondent, the Westminster Bank Ltd. (hereinafter called " the bank "); (3) that the plaintiffs in the action as it was then constituted, namely, the Nizam and the

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State of Hyderabad (hereinafter called "the plaintiffs"), should pay to the bank their taxed costs of the motion; and (4) that the plaintiffs should have leave to appeal.

The facts, stated by Viscount Simonds and other Lords, were as follows: In September, 1948, Indian troops were invading the territory of Hyderabad. The appellant was High Commissioner for Pakistan in the United Kingdom and he held that office until February 13, 1952. In that capacity he was bound to act upon the instructions of the Government of Pakistan normally given to him by the Foreign Minister, Sir Mohammed Zafrullah Khan.

In the same month there were certain funds standing to the credit of the account of the Government of Hyderabad with the bank. For the purpose of this appeal no distinction was to be made between the State, the Government and the Nizam of Hyderabad. The Nizam was an absolute monarch. His Finance Minister was then the Nawab Moin Nawaz Jung (hereinafter called "Moin"), and the Agent General for Hyderabad in London was the Nawab Miz Nawaz Jung Bahadur (hereinafter called "Miz"). Each of them was authorized to draw on this account and there was no ostensible limit to his authority.

On or about September 16, 1948, it was orally agreed between the appellant and either Moin or Miz (it was not quite clear which) that the money then standing to the credit of the account should be transferred to an account in the name of the appellant as High Commissioner for Pakistan, and in pursuance of that agreement he signed the necessary specimen signature forms, and Moin by a letter of the same date instructed the bank to transfer the moneys in question to the credit of the account of the appellant. The bank accordingly transferred such moneys, amounting to £1,007,940 9s. 0d. to the credit of an account entitled "To Habib Ibrahim Rahimtoola (High Commissioner "for Pakistan in London)" and forwarded to him a credit advice showing this title.

On July 15, 1955, the appellant made an affidavit stating: "On or about September 16, 1948, it was agreed between [Moin] "and myself that the said funds should be transferred to me as "the agent for the Government of Pakistan. . . . I accepted "such transfer in accordance with the instructions of and as "agent for my Government."

On June 19, 1956, he made a further affidavit stating, with regard to the interview in September, 1948, with the Nizam's representative: "The then Foreign Minister of Pakistan Sir

"Mohammed Zafrullah Khan was present at the interview "between such representative and myself and he instructed me "to accept the transfer of the said funds. I objected . . . but "my objections were overruled by the said Zafrullah Khan who "directed me to agree to the transfer of the said funds to an "account in my name but to be described as the High Commissioner for Pakistan. . . . I would never have agreed to the "said transfer unless I had been expressly instructed to do so as "High Commissioner for Pakistan. . . . It was never suggested "to me that I should accept the said funds on my own account "as a private individual as an agent or trustee for the Nizam "but if it had I should have refused to do so as I would have "considered it improper to act in such a way while holding the "position of High Commissioner. . . . After accepting the said "transfer I regarded myself as bound to deal with the account "in accordance with the instructions of my Government."

The appellant was not cross-examined, but his actions after September, 1948, were consistent with his assertions.

It was asserted by the Nizam that the action of Moin was unauthorized by him. When the matter was before Upjohn J. the evidence was regarded by him as inadequate, but in the Court of Appeal further evidence was admitted, an affidavit by the Nizam himself, containing his statement, which was not challenged, that Moin had no authority to make the transfer in question. It was not, however, imputed to the bank or to the appellant that Moin's ostensible authority was known by either of them to have been exceeded.

On July 27, 1953, the appellant, who had then become Ambassador of Pakistan to France, acting on the instructions of his Government, requested the bank to transfer the account to the name of Mr. M. A. H. Ispahani, then the High Commissioner for Pakistan in the United Kingdom, stating that the account would in future be operated by him and his successors in office. To this the bank replied by a letter in which they stated that, as he was aware (and as the fact was), a claim had been made regarding the moneys in question by the Nizam's Government and that on September 28, 1948, a Mr. Gupta as Financial Secretary of that Government had sent them a cable objecting to their action in making the transfer in question. They further stated that he would, no doubt, also be aware of the statement made in the Indian Parliament that the Indian Government proposed to file a suit for the recovery of the amount standing to the credit of such account. This last statement could be disregarded, for it appeared that, the State of Hyderabad having been dissolved, whatever rights that State, or India as its successor had, had been formally assigned to the Nizam.

Thus matters stood in July, 1953, and the bank adopted the attitude that they could not admit the claim of either the Nizam or the Pakistan Government until their rights had been determined in proper proceedings. Accordingly, on July 8, 1954, a writ was issued by the Nizam and the State of Hyderabad as co-plaintiffs against Moin, the bank and the appellant claiming payment of the sum of £1,007,940 9s. 0d. under three alternative heads, (a) as money held in trust for the Nizam (in this appeal the State of Hyderabad could be ignored), (b) as money due and owing to the Nizam, (c) as money had and received to the use of the Nizam. For the present purpose, other claims in the writ could be ignored. A statement of claim was duly delivered to which the bank put in a defence. A concurrent writ was by leave served out of the jurisdiction on Moin and the appellant, and on July 19, 1955, the appellant gave notice of motion (which was amended on September 4, 1956) for an order setting aside the writ and concurrent writ and all subsequent proceedings against the appellant and the bank.

The appellant prosecuted this appeal on the instructions of his Government.

Bernard MacKenna Q.C., *Richard Wilberforce Q.C.* and *Oliver Smith* for the appellant. The English courts have no jurisdiction to entertain an action against the property of a foreign sovereign. The following questions arise: Did the appellant act as the agent of the State of Pakistan? Is there a distinction between the principal officers of a Government and other officers for the purposes of the rule just mentioned? Does that rule apply to a case where the agent of a foreign sovereign can be sued without joining the foreign sovereign as a party?

In the Court of Appeal a distinction was drawn between principal officers of a State as persons in whom property vested and persons who were not principal officers, and reliance was placed on *Buller* v. *Harrison* [1] and the cases deriving from it, referred to by Lord Evershed M.R. in the Court of Appeal in the present case.[2]

Those cases do not touch the question whether a sovereign can object to an action being brought against his agent to recover money held by that agent. The extent of those cases is not clear: see Halsbury's Laws of England, 3rd ed., vol. I, p. 233, para. 522. But one cannot get indirectly from the agent what the rule of sovereign immunity would prevent one from getting directly from the sovereign. *Twycross* v. *Dreyfus* [3] shows that one cannot by suing the agent get over the difficulty of suing the principal himself. The immunity covers actions in personam against persons other than the sovereign himself. Under the rule the right of a bailor against a bailee to be restored to the possession of a chattel is treated as property: see *United States of America* v. *Dollfus Mieg et Cie S.A.*,[4] where the rule as to immunity was applied to 51 gold bars in the hands of the bailee of a foreign sovereign. There the sovereign's right to possession as bailor against the bailee was enough to establish the immunity without proof of title. The two fundamental principles as to sovereign immunity are stated in *Compania Naviera Vascongado* v. *S.S.* "*Cristina.*" [5] To establish immunity it is enough to show that there are conflicting rights: *Juan Ysmael & Co. Inc.* v. *Indonesian Government.*[6]

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[1] (1777) 2 Cowp. 565.

[2] [1957] Ch. 185, 238–239; [1957] 1 All E.R. 257.

In the present case the appellant relies on the fact that he has got the legal title. In conflict with that are the equitable claims advanced by the other side. The legal title is vested in Pakistan and Pakistan was entitled to sue the bank at law in its own name without joining the appellant as a party, because it was his principal: *Cooke* v. *Seeley*,[7] *Haile Selassie* v. *Cable and Wireless Ltd.*[8] and *Bradford* v. *Chase National Bank of City of New York.*[9]

The trust cases were treated by Lord Radcliffe in the *Dollfus Mieg* case [10] as exceptional and in a class by themselves. *Strousberg* v. *Republic of Costa Rica* [11] indicates that the exception to the rule of immunity said to be established by the trust cases does not extend to cases like the present where the trustee is the sovereign himself or his agent. See also *Duke of Brunswick* v. *King of Hanover* [12] and Dicey's Conflict of Laws, 6th ed., pp. 133–134. If the respondent's action did not lie at common law because of sovereign immunity, it would be strange if he

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[3] (1877) 5 Ch.D. 605, 616.

[4] [1952] A.C. 582, 597, 615, 617, 620–621; [1952] 1 T.L.R. 541; [1952] 1 All E.R. 572.

[5] [1938] A.C. 485, 490; 54 T.L.R. 512; [1938] 1 All E.R. 719.

[6] [1955] A.C. 72; [1954] 3 All E.R. 236.

[7] (1848) 2 Ex. 746.

[8] [1938] Ch. 839; 54 T.L.R. 996; [1938] 3 All E.R. 384.

[9] (1938) 24 F.Supp. 28, 38.

[10] [1952] A.C. 582, 619.

[11] (1881) 44 L.T. 199.

[12] (1844) 6 Beav. 1, 39.

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could successfully proceed against the agent in equity. *Gladstone* v. *Musurus Bey*[13] is now of doubtful authority. It is not relevant to the case of the appellant. *Larivière* v. *Morgan*[14] does not help the respondent in his resistance to the motion in this case. That case is distinguishable because there the French Government did not object to an inquiry whether the money was impressed with a trust. See also what Jenkins J. and Lord Evershed M.R. said in the *Dollfus Mieg* case.[15]

Buller v. *Harrison*[16] was considered in the Court of Appeal in the present case and reference was made in this connexion to Halsbury's Laws of England, 3rd ed., vol. I, p. 233, para. 522, but that case does not apply where the principal is a foreign sovereign. Payment to the agent was equivalent to payment to the principal and, even though the appellant has retained the money, he cannot be proceeded against: see *Ellis* v. *Goulton.*[17] All the authorities cited by Lord Evershed M.R. in this connexion are either cases of mistake or cases where the action failed against the agent on the ground that he had accounted to his principal. There is no authority for extending the rule in *Buller* v. *Harrison.*[18] It is by no means clear that the principle in that case extends to the present case. The cases cited by Lord Evershed M.R. have nothing to do with sovereign immunity. *Sims* v. *Bond*[19] is not against the appellant, because Pakistan as principal could sue the bank in its own name without joining the appellant.

The subject-matter of this case is "property" within the meaning of the word as used by Lord Atkin in the *Cristina* case.[20] The rule as to sovereign immunity applies to choses in action.

As to whether a party is an organ or department of the Government, see *Baccus S.R.L.* v. *Servicio Nacional del Trigo.*[21]

As to whether the appellant had at the material times something of the character of an ambassador, see International Law Opinions, selected by Lord McNair, vol. I, pp. 196–197.

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[13] (1862) 1 H. & M. 495, 498, 502.

[14] (1872) L.R. 7 Ch. 550, 552; (H.L.) sub nom. *Morgan* v. *Larivière* (1875) L.R. 7 H.L. 423.

[15] Sub nom. *Dollfus Mieg et Compagnie S.A.* v. *Bank of England* [1949] Ch. 369, 384, 394; [1949] 1 All E.R. 946; Rev. (C.A.) [1950] Ch. 333, 357; 66 T.L.R. (Pt. 1) 675; [1950] 1 All E.R. 747; (Procedure Summons) Restored in Part [1951] 1 Ch. 33; 66 T.L.R. (Pt. 2) 559; [1950] 2 All E.R. 605.

[16] 2 Cowp. 565.

[17] [1893] 1 Q.B. 350; 9 T.L.R. 223.

[18] 2 Cowp. 565.

[19] (1833) 5 B. & Ad. 389.

[20] [1938] A.C. 485, 490.

[21] [1957] 1 Q.B. 438, 467; [1956] 3 All E.R. 715.

If it is established that the title to the subject-matter of this action was in the appellant as agent for Pakistan, enough is established to show that an action to compel him or the bank to pay the money to the Nizam would interfere with the sovereign's property. To allow the action to go on for an injunction would be almost as great an interference.

In summary, the debt belonged to Pakistan. It had the legal title. It could sue the bank in its own name, or its agent, the appellant, could sue. Pakistan could direct him to sue for it, to collect it and to hand it over; it therefore had control of it.

Sir Andrew Clark Q.C. and *Samuel Cooke* for the Nizam. The vital question is: In what capacity did the appellant take the property? Did he take it as a private individual or as agent for Pakistan or as the organ of Pakistan? The question is one of mixed fact and law. The three theoretical possibilities were set out by Romer L.J. in the Court of Appeal.[22] The evidence shows that it cannot be the third. The appellant did not take in his capacity as High Commissioner. That designation in the title to the credit account and in the credit advice was merely descriptive and was not intended to indicate that the Pakistan Government had any interest in the account. The money was never Pakistan money and Pakistan does not claim any beneficial interest in it. The Court of Appeal was right in accepting the first possibility.[23]

The original moneys belonged to the State of Hyderabad. The Nizam was at all material times an absolute monarch and there is no distinction between the public funds and his privy purse, so that the moneys can be regarded as belonging to him. Moin and Miz had a limited authority to operate the account in a fiduciary capacity. If they drew any money out, it became trust money. Moin was committing a breach of trust in transferring the money to the name of the appellant, who knew that it belonged either to the Nizam or to his Government.

It is necessary to examine in what circumstances the appellant took the money, and the action should proceed because the full evidence of the facts is not before the court.

The present case is different from the *Dollfus Mieg* case,[24] because there at the material time the Governments were in control of the 51 gold bars. Reliance is placed on the decision in that case as to the 13 gold bars which the bank had sold. In the present case the extent of the agency was only to act as trustee for the Nizam. Moin thought that he was safeguarding the Nizam's money and, in receiving it, the appellant was either (1) acting as an individual, or (2) acting as an individual on the instructions of Pakistan, or (3) acting for Pakistan as trustee for the Nizam. The third possibility represents the only possible agency, but Pakistan could not give the appellant instructions inconsistent with his trusteeship; the limit of its rights would have been to take over the trusteeship and appoint another trustee. The fact that property is transferred to a person holding an official position does not mean that he holds it in that official capacity: see *Brunton* v. *Forrest*.[25] But the appellant was never an agent for Pakistan at all in this matter, merely accepting the office of trustee at the direction of Pakistan. He cannot in any view have been an agent to hold the money for Pakistan, because Pakistan had no right to it.

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[22] [1957] Ch. 185, 243.

[23] Ibid. 237.

[24] [1952] A.C. 582.

The transfer of the legal title to the appellant by Moin was made by mistake and wrongfully and in breach of trust, and when the appellant and Pakistan became aware of this before they had dealt with the money, it became payable to the Nizam at his suit and the appellant became trustee for him: see *Buller* v. *Harrison*[26]; Halsbury's Laws of England, 3rd ed., vol. I, p. 233; Bowstead on Agency, 11th ed., p. 266, and the American Restatement of the Law of Agency (1933), vol. II, p. 745, s. 339; p. 750, s. 341. Reliance is also placed on the cases cited by Lord Evershed M.R. in the Court of Appeal.[27] The question of sovereign immunity does not arise.

The appellant did not receive the money from Pakistan but from the Nizam. At the time when the writ was issued Pakistan had no right or title to the money and the fact that he took it on the instructions of Pakistan is nihil ad rem. He was a trustee for the Nizam from the very start. It has not been challenged that Moin had no authority to hand over the money.

In order to raise the defence of immunity the foreign sovereign must show that he has control of the property in question. The onus of establishing immunity by showing that he acted as the agent of Pakistan is on him. The Court of Appeal was right on this point.[28] If Moin had deposited a bag of diamonds in the appellant's desk, the question would have arisen whether the appellant's possession was Pakistan's possession. It would be an extension of the *Dollfus Mieg* case[29] to say that that alone was sufficient to establish sovereign immunity because Pakistan was not the bailor.

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[25] (1849) 14 L.T.O.S. 121.

[26] 2 Cowp. 565.

[27] [1957] Ch. 185, 238–239.

[28] Ibid. 240–241, 248.

[29] [1952] A.C. 582.

As to the trust cases, it is a well-established principle of English law constituting an exception to the general rule as to sovereign immunity that the court will not be deterred from exercising its equitable jurisdiction to administer or enforce a trust and determine the rights to trust property within the jurisdiction, even though a foreign sovereign, who declines to submit to the jurisdiction, is a claimant to an interest in it: see the *Dollfus Mieg* case.[30] This principle is equally applicable when the foreign sovereign is claiming, not a beneficial interest in the trust property, but a bare legal title thereto: see *per* Lord Evershed M.R. and Romer L.J. in the Court of Appeal in the present case.[31] The appellant admitted that he holds the property as a trustee. If, on the other hand, Pakistan is the trustee, he is the trustee's agent. The only beneficiary is the Nizam. If Pakistan were claiming a beneficial interest and seeking to get from the appellant, as the trustee, both the legal and equitable title, that would be within the trust cases. There is no difference when Pakistan is claiming the legal and not the equitable title. Here Pakistan is claiming the legal title on the footing that the appellant was its agent. The trust cases apply, since there is a fund in the hands of the appellant and the court will investigate the title to it. Further, there was a resulting trust for the Nizam because there was no consideration for the transfer, which was not a gift.

If, on the other hand, Pakistan itself is the trustee, still Pakistan has not itself got the legal title, which is in the appellant. In that view there is a trust and the Nizam claims to be beneficially entitled to the fund.

Even if a foreign sovereign himself be the trustee, the trust cases apply, because here the property can be got at without the necessity of making a personal order against the foreign sovereign. The difficulty envisaged by Lord Evershed M.R. in the Court of Appeal[32] does not arise.

The relevant cases are *Strousberg* v. *Republic of Costa Rica*,[33] *per* James L.J.; *Duke of Brunswick* v. *King of Hanover*[34]; *Sultan of Johore* v. *Abubakar Tunku Aris Bendahar*[35]; *Nabob of the Carnatic* v. *East India Company*,[36] and *Berger* v. *Chase*

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[30] [1952] A.C. 582, 617–618.

[31] [1957] Ch. 185, 242, 250.

[32] Ibid. 242.

[33] 44 L.T. 199.

[34] 6 Beav. 1, 39.

[35] [1952] A.C. 318; [1952] 1 T.L.R. 1106; [1952] 1 All E.R. 1261.

[36] (1791) 1 Ves. 371; (1792) 2 Ves. 56.

National Bank of City of New York.[37] See also an article on Immunity of Foreign States: The Practice of the French Courts, by C. J. Hamson, in the British Year Book of International Law (1950), vol. XXVII, pp. 293, 298 and 319.

As to what constitutes a trust, see *Henry* v. *Hammond*,[38] which shows that the appellant here was in the position of a trustee.

The *Dollfus Mieg* case [39] turned on the special features of a contract of bailment. There the bailor had actual possession of the goods in question before the bailment, an immediate right to possession and a right to bring an action to protect the bailed goods. The bailee was estopped from denying the bailor's title.

Juan Ysmael & Co. Inc. v. *Indonesian Government* [40] is strongly relied on. It is very close to the present case and indicates that here Pakistan has established no title which is not purely illusory.

Cooke v. *Seeley* [41] does not apply to this case. Once Pakistan had notice that the transfer was made without authority, its right had gone. That stopped any right of action which it might have against the bank.

As to *Baccus S.R.L.* v. *Servicio Nacional del Trigo*,[42] it is a question of fact in each case whether or not a particular person is a Department of State. The appellant, who is defendant, was not High Commissioner at the date of the writ. The onus is on the appellant to show that he was a Department of State, and on that there is no evidence. Throughout the transactions the appellant acted as a private individual in whom Moin had confidence as a proper person to hold the money.

Even if the action be stayed against the appellant, it should be allowed to proceed against the bank. The only motion to stay is the appellant's and the only ground on which it is alleged that the action should be stayed against the bank is that it is said that for it to continue would be an indirect suing of Pakistan. But it is not an interference with the rights or property of Pakistan.

The claim is for money had and received. It is admittedly for money originally belonging to the Nizam which was transferred

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[37] (1939) 105 F. 2d. 1001, 1002, 1003, 1009.

[38] [1913] 2 K.B. 515, 520; 29 T.L.R. 340.

[39] [1952] A.C. 582, 594, 600–601, 602–603, 604, 605, 606, 607, 608, 611, 612, 615, 617, 618–620, 621–622.

[40] [1955] A.C. 72.

[41] 2 Ex. 746.

[42] [1957] 1 Q.B. 438, 440, 442, 456, 465, 467, 471.

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by the bank to the appellant without authority, although the bank had no knowledge of the want of authority. Before the bank had accounted to the transferee it had notice of the want of authority. To justify staying the action it must be shown that Pakistan would be prejudiced if the action continued. But, as it is, Pakistan cannot get the money without suing the bank. On the Nizam's claim for money had and received no party need be joined but the bank. Sovereign immunity has not the object of penalizing any person; it is to prevent the right of a sovereign being interfered with. The only question on this point is whether the rights of Pakistan are being interfered with: see *Haile Selassie* v. *Cable and Wireless Ltd.*[43] In the *Dollfus Mieg* case[44] a clear distinction was drawn between earmarked gold bars deposited with the bank and bars which had gone into a common pool. A bank account is more nebulous than a right to receive so many ounces of fine gold. So far as the decision on the 13 bars which had been sold was concerned, that case is indistinguishable from the present case. The object of the rule of sovereign immunity is not to prevent the courts from considering matters which might embarrass a foreign sovereign. It is to prevent interference with the foreign sovereign's property. The claim for an injunction is on the same footing as the other claim: see *Gladstone* v. *Musurus Bey.*[45]

The claim against the bank based on trust is distinguishable from the claim for money had and received. This equitable claim could proceed against the bank alone without the appellant.

The objection that if the case were allowed to proceed against the bank alone, it would risk being twice vexed in respect of the same claim has nothing to do with sovereign immunity. The rights of Pakistan would not be interfered with, since they would be the same whether or not the Nizam proceeded against the bank.

Geoffrey Cross Q.C., *Eustace Roskill Q.C.* and *Peter Foster* for the bank. The one wish of the bank is to know to whom it can safely pay the money. It is satisfied with the order of the Court of Appeal, but if the House holds that the proceedings should be stayed, then the order of Upjohn J. should be restored in toto.

To allow the action to proceed against the bank alone would infringe sovereign immunity. The case must be considered as though the account were in the name of Pakistan.

[43] [1938] Ch. 839, 844.

[44] [1952] A.C. 582, 598, 603.

[45] 1 H. & M. 495.

In the future the parties might reach an agreement as to the money, or leave it in the bank's hands indefinitely, or else the appellant might bring an action.

The *Haile Selassie* case[46] was quite different from the present case.

The Nizam has only an equitable right, and when a plaintiff has only such a right in the thing demanded, the person having the legal right (here the appellant) must be a party to the action: see *Performing Right Society Ltd.* v. *London Theatre of Varieties Ltd.*[47]

It makes no difference whether the claim is for money had and received or is based on an equitable title; the money cannot be recovered without making the appellant a party.

VISCOUNT SIMONDS intimated that their Lordships did not require to hear argument in reply on the question whether or not the appellant acted as a private individual.

Bernard MacKenna Q.C. in reply. Pakistan could control the disposition of the fund by instructions which the appellant would obey. If it asserted a right against the bank, that would abate and destroy his right to sue the bank, since, when the principal intervenes, the right of the agent to sue is gone. When Pakistan disclosed itself as the principal the right of the agent was gone: *Sadler* v. *Leigh*.[48]

The appellant has discharged the onus of showing that he acted as the agent of Pakistan, and *Sims* v. *Bond*[49] and *Cooke* v. *Seeley*[50] apply.

The rule of sovereign immunity applies when proceedings would interfere with the sovereign's interest, either directly or indirectly: *per* Jenkins J. and Lord Radcliffe in the *Dollfus Mieg* case.[51] These observations show the principle.

These proceedings would interfere with Pakistan's rights in the account. There would be an interference with something in which it has shown a proprietary interest.

As to the *Buller* v. *Harrison*[52] line of cases, see *Ellis* v. *Goulton*,[53] cited in Halsbury's Laws of England, 3rd ed., vol. I, p. 233.

The *Dollfus Mieg* case[54] shows that the circumstance that someone other than the sovereign can be sued does not prevent the rule of sovereign immunity from being successfully invoked: see *Wilson* v. *Anderton*.[55]

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[46] [1938] Ch. 839.

[47] [1924] A.C. 1, 13–14; 40 T.L.R. 52.

[48] (1815) 4 Camp. 195.

[49] 5 B. & Ad. 389.

[50] 2 Ex. 746.

[51] [1949] Ch. 369, 394; [1952] A.C. 582, 617, 619–620.

[52] 2 Cowp. 565.

[53] [1893] 1 Q.B. 350, 353–354.

[54] [1952] A.C. 582, 619.

Pakistan was in a de facto situation of control through the appellant, who would act wholly in accordance with his instructions, and that situation is not altered by giving the bank notice of the Nizam's claim: see the case of *The Cristina*.[56] There is no evidence that the appellant acted in excess of his authority.

A trust action cannot be brought against an agent: *Attorney-General* v. *Earl of Chesterfield*.[57] One cannot be a trustee as an agent for someone else, and the appellant could not be trustee as agent for Pakistan.

It was said that the *Dollfus Mieg* case [58] would be analogous to the present case if the gold bars there had gone into a pool, but that is not so, as appears from the argument in reply for the appellants in that case.[59] The analogy is really between the 51 earmarked bars and the debt which the present appellant owed to Pakistan.

As to the French case cited in the British Year Book of International Law (*Vestwig's* case [60]), see *per* Lord Evershed M.R. in the Court of Appeal.[61]

It would be strange if this action could continue against the bank on the footing of money had and received but not that of trust.

To grant an injunction restraining the bank from paying the money to Pakistan would be a gross interference with the rights of Pakistan. It would be even more of an interference to direct the bank to pay the money to the Nizam.

Their Lordships took time for consideration.

Nov. 7. VISCOUNT SIMONDS. My Lords, the question in this appeal is whether the Court of Appeal were right in refusing to set aside a writ of summons and all subsequent proceedings in an action brought by the respondent, the Nizam of Hyderabad, against the appellant, and further refusing to stay all further proceedings in the same action against the respondents, Westminster Bank Ltd. An order to that effect had been made by Upjohn J. but was reversed by the Court of Appeal.

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[55] (1830) 1 B. & Ad. 450.

[56] [1938] A.C. 485, 501, 505.

[57] (1854) 18 Beav. 596.

[58] [1952] A.C. 582.

[59] Ibid. 597.

[60] (1946) Sirey Recueil Général, 1947, I, 137; Annual Digest and Reports of Public International Law Cases, 1946, Case No. 32, p. 78.

[61] [1957] Ch. 185, 242.

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[His Lordship stated the facts and continued:] I pause to observe that the position of the bank has throughout been one of impartial willingness to pay its debt to whomsoever it may be justly due but, reasonably enough, it is anxious not to have this action continued against it, but not against the appellant. This anxiety is shared by the appellant and has determined the form of order originally made by Upjohn J. and the course of the argument on this appeal.

Upon the motion coming before that learned judge with a number of affidavits on either side which add little, if anything, to the bare statement I have made, an order was made in accordance with its terms. I have read and re-read the judgment of the learned judge, and I may perhaps be permitted to say that I find in it such a lucid exposition of the facts and relevant law that I should have been content to adopt it as my own and say no more but for the fact that the Court of Appeal came to a different conclusion and set aside his order. In my opinion, as I believe is that of all of your Lordships, they were wrong in doing so.

The first question is: in what capacity did the appellant accept a transfer of the funds in question and become the customer of the bank, to whom it was primarily accountable? It has been said that there are three possible views. The first is that he was acting as a private individual. This view is so clearly untenable that I will not say more about it. The other alternatives were stated thus by Romer L.J.[1]: (1) that he was acting as "agent" for Pakistan, and (2) that he was acting as the "organ" or "alter ego" of Pakistan, and that learned Lord Justice came to the clear conclusion that he accepted the transfer in his official capacity as servant or agent of Pakistan. On the other hand, he could not accept the view that he was the "organ" or "alter ego" of Pakistan. If these words or either of them connote that a High Commissioner is in the same sense to be identified with the Government he represents, as is, for instance, a Department of State, I am not prepared to take a different view. But, for the purpose of the present case, it appears to me to be unimportant. No doubt, if a defendant, by whatever name he is called, can be identified with the Sovereign State, his task is easy: he need prove no more in order to stay the action against him. But, as soon as it is proved that quoad the subject-matter of the action the defendant is the agent of a Sovereign

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[1] [1957] Ch. 185, 243; [1957] 1 All E.R. 257.

State, that, in other words, the interests or property of the State are to be the subject of adjudication, the same result is reached. This is precisely what is meant by the rule thus stated in Dicey's Conflict of Laws, 6th ed., p. 131: "Rule 19. The court has "(subject to the exceptions hereinafter mentioned) no jurisdiction to entertain an action or other proceeding against (1) any "foreign sovereign . . . An action or proceeding against the "property of any of the foregoing is, for the purpose of this rule, "an action or proceeding against such person. . . ." "Two propositions of international law," said Lord Atkin in *Compania Naviera Vascongado* v. *S.S.* "*Cristina*"[2] "[are] engrafted into "our domestic law which seem to me to be well established "and to be beyond dispute. The first is that the courts of a "country will not implead a foreign sovereign. That is, they will "not by their process make him against his will a party to legal "proceedings, whether the proceedings involve process against "his person or seek to recover from him specific property or "damages. The second is that they will not by their process, "whether the sovereign is a party to the proceedings or not, "seize or detain property which is his, or of which he is in "possession or control."

I should not, my Lords, have reminded your Lordships of these very familiar propositions were it not that the Court of Appeal has, as it appears to me, failed to observe them. That the Government of Pakistan were the principals (disclosed or undisclosed, it matters not) for whom the appellant as agent held the account in question with the bank, is, as I have already said, established beyond doubt. They were and are in a position to sue the bank either in the name of their agent, the appellant, or, if he were unwilling that his name should be used, in their own name, adding him as a defendant. The bank could not pay any other person without disregard of, and detriment to, their interests. For the bank knows only the appellant and knows him, as I think, though it does not matter, as the agent of the Government. I do not understand what difference it makes to this simple fact that before the Court of Appeal it was proved, or at least asserted and not disproved, that Moin exceeded his authority in making the transfer to the appellant. It would or might be important if the matter was litigated, but that is just what the Government of Pakistan, through its agent, declines to do. Much stress has been laid on the fact that it has not asserted a beneficial interest in the fund. But why should it? It is not concerned to admit, assert or deny. It has the legal title, which cannot be displaced except by litigation which it is entitled to decline. It rests on the principle, the statement of which I take from the judgment of the Court of Appeal in *Haile Selassie* v. *Cable and Wireless Ltd.*[3] just because the respondent particularly relied on that case: "If property locally situate in this country is shown to "belong to, or to be in the possession of, an independent foreign "Sovereign, or his agent, the courts cannot listen to a claim "which seeks to interfere with his title to that property, or to "deprive him of possession of it." It is true that in that case the court did not decline to adjudicate on the claim of a foreign sovereign State: it did so on the ground that, as there stated, "in the case of a debt such as that with which we are concerned "there can be no question of possession or control and the title "to it is the very thing which stands to be established or not to "be established in these proceedings." Your Lordships are not concerned to consider whether the principle, which was there correctly stated, was also there correctly applied. In the present case its application does not appear to me to be in doubt. The property in dispute is situate in this country. I say that because it is, for many purposes, necessary to ascribe a situation to a chose in action which physically has none, and, for the purpose of this doctrine, no other situation can be ascribed to it than the place in which it can be sued for and enforced. A suit by a third party, the Nizam, is calculated and intended to interfere with the title of Rahimtoola and his principals, the Government of Pakistan, and with their possession or control of their property. It can only be maintained if the Government of Pakistan take a course which their sovereign dignity entitles them to reject and descend into the arena. I have used the words "possession or control" because they are the words used in the statement of principle that I have adopted. It may be said that "possession" is not an apt word in connexion with a chose in action, but it seems to me that the two words, whether used together or separately, are apt to describe the relation in which an owner stands to the property which he owns. I would deprecate fine distinctions in our municipal laws in the application of international doctrine. Let it be supposed that a bank holds valuables, as, for instance, gold bars, on account of a foreign government or its agent and at the same time is indebted to the same party on current or deposit account in a sum of £x. It has been made clear by the recent case of *United States of America* v. *Dollfus Mieg et Cie S.A.*[4] that the foreign government could deny the jurisdiction of an English court to adjudicate upon their rights in regard to the valuables. I decline to accept the argument of counsel for the respondent that this conclusion rested upon any sacred principle as to the rights of bailor and bailee, and I should regard it as deplorable if the court, while accepting, as a matter of comity, the right of the foreign government to deny its jurisdiction in regard to valuables, yet rejected it in regard to a chose in action. To make one law in regard to valuables, bars of gold or perhaps bearer bonds, and another in regard to simple contract debts is not a policy that should recommend itself to your Lordships. Whether the property is a gold bar or a debt, the Government of Pakistan is the legal owner and is entitled to refuse to have its title investigated. The case law dealing with this question has been so recently and so fully expounded in the *Dollfus* case[4] that I think it unnecessary to add anything on the broad question.

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[2] [1938] A.C. 485, 490; 54 T.L.R. 512; [1938] 1 All E.R. 719.

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[3] [1938] Ch. 839, 844; 54 T.L.R. 996; [1938] 3 All E.R. 384.

There are, however, two other aspects of the question which I must examine.

In the Court of Appeal, and, as I understand, not until his reply, counsel for the Nizam raised a novel point which had not been considered by Upjohn J. but which found favour with that court. The argument runs thus. It is the law as laid down by a series of cases starting with *Buller* v. *Harrison*,[5] and as stated in Halsbury's Laws of England, 3rd ed., vol. 1, p. 233, para. 522, that " if a third person pays money to an agent under a mistake " of fact, or in consequence of some wrongful act, the agent is " personally liable to repay it, unless, before the claim for " repayment was made upon him, he has paid it to the principal " or done something equivalent to payment to his principal." Apply this principle of law to the facts of this case. The account was transferred to the name of Rahimtoola by a mistake of fact or other wrongful act, namely, the unauthorized action of Moin; Rahimtoola and the bank were informed of the wrongful act and of the Nizam's claim before Rahimtoola had dealt with the account either by paying the money to his principal or in any other way. Therefore, it is concluded, Rahimtoola is liable in this suit to repay the Nizam and there is no need to consider any question of sovereign immunity. This argument, as I say, was successful in the Court of Appeal, but I think that your Lordships unanimously reject it.

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[4] [1952] A.C. 582; [1952] 1 T.L.R. 541; [1952] 1 All E.R. 572.

[5] (1777) 2 Cowp. 565.

My Lords, I am not concerned to deny that in a suit in which private persons only are concerned the rule in *Buller* v. *Harrison*,[5] if I may call it so, may prevail, though I would suppose that, in any case, the principal should not be denied the opportunity of asserting that the money was not paid to his agent in consequence, for instance, of a mistake of fact. But where, as for this purpose I assume to be the case here, the transfer is made to one who, if not an "organ" of a foreign government, is demonstrably its servant and agent, it would make a strange breach in the international principle if it were open to a third party to recover from the agent by the mere assertion of mistake or other wrongful act. That is the very thing which the agent on behalf of his principal is concerned to dispute, and if his principal is a foreign sovereign it is the very thing upon which the courts of this country may not adjudicate in the face of the foreign sovereign's objection. I look again at the writ to see what is the substance of the matter. The claim is that money was paid to Rahimtoola in trust for the Nizam or as money due and owing to the Nizam or as money had and received to the use of the Nizam. These are matters which directly concern the principal on whose behalf Rahimtoola received the money. They cannot be determined without impleading him. Therefore they cannot be determined at all.

The second matter is this. As your Lordships are aware, this branch of the law has long ago been complicated by a series of cases in the Court of Chancery or the Chancery Division of the High Court in which the question has been of a claim by a foreign sovereign to a trust fund or a share in a trust fund subject to the administration of the court. On this subject I can add nothing to what was said by my noble and learned friend, Lord Radcliffe, in the *Dollfus* case.[6] But I have failed to see that they have any relevance to the present case. Here is no trust fund which is being administered by the court. It is possible that, if the action proceeded as between private persons and all the matters in dispute were litigated to a conclusion, it might be held (though truly it would be unnecessary to do so) that Rahimtoola held the account with the bank in trust for the Nizam. But that is a consequence of carrying to a successful conclusion litigation which in its inception has nothing in common with the administration of a trust. Certainly the Government of Pakistan has

[5] 2 Cowp. 565.

[6] [1952] A.C. 582.

never admitted that its agent or itself is a trustee for the Nizam, and until that fact is established the cases that have been cited are wholly irrelevant. It cannot be established because the Government through its agent declines adjudication by our courts.

It remains to consider the question of the bank, whose attitude I have already stated. It is willing to pay whomsoever it may be ordered to pay but unwilling that the action should be stayed against Rahimtoola but continued against itself. It is, I think, clear that it would not be right to allow the action to proceed against the bank alone. Such a course would lay it open to a second attack. The account is the account of the Government of Pakistan in the name of its agent. If it pays a third party under an order of the court made in proceedings by which that Government is not bound, it is not safeguarded against a further claim. But, further than that, since the legal title is in the Government, it cannot in substance be anything but a grave interference with its property for a third party to sue the bank and, if the suit is successful, to recover from the bank the money to which it is nominally entitled.

In my opinion, in this, as in the rest of his judgment, Upjohn J. was right. This appeal should therefore be allowed, the order of the Court of Appeal set aside and that of the learned judge restored. The respondent, the Nizam, must pay the costs of the appellant, Rahimtoola, and the Westminster Bank here and in the Court of Appeal.

My Lords, I must add that, since writing this opinion, I have had the privilege of reading the opinion which my noble and learned friend, Lord Denning, is about to deliver. It is right that I should say that I must not be taken as assenting to his views upon a number of questions and authorities in regard to which the House has not had the benefit of the arguments of counsel or of the judgment of the courts below.

LORD REID. My Lords, in this case the Nizam of Hyderabad sues for payment of a sum of just over one million pounds. That sum is held by the respondent bank in an account standing in the name of "Habib Ibrahim Rahimtoola (High Commissioner for "Pakistan in London)." Rahimtoola is the appellant in this appeal. The State of Pakistan claims that this action should be stayed on the ground that it infringes the sovereign immunity of Pakistan from actions in our courts. Such a claim may arise from a sovereign State's claim to have a beneficial interest in the property which is the subject of the action, but no such claim is made in this case. The claim to immunity may also arise by reason of the State having some other interest in the property. In *United States of America* v. *Dollfus Mieg et Cie S.A.*[7] no beneficial interest was claimed in gold bars deposited in a bank, but the States concerned had as bailors an immediate right to possession of the bars. This was held sufficient to entitle them to have an action stayed which was brought by the owners of the bars against the bank. The question in this case is whether Pakistan has an interest such that its claim to sovereign immunity requires this action to be stayed.

In 1948 this money was deposited with the respondent bank in an account in the name of the Government of Hyderabad, and the persons entitled to operate on this account were the Agent General and the Finance Minister of Hyderabad. In September, 1948, Indian troops were invading the territory of Hyderabad and the Finance Minister approached the appellant with a view to the money being transferred to him. No doubt the Finance Minister acted in what he thought were the best interests of the Nizam, but he had no authority to make such a transfer. The appellant was not then aware of this.

The only evidence about the transaction is that given by the appellant in two affidavits. He was not cross-examined. It appears that a meeting took place on September 16 at which there were present the Finance Minister of Hyderabad, the appellant, who was then High Commissioner for Pakistan, and the Foreign Minister of Pakistan. The appellant did not wish to become involved, but he was overruled by his Foreign Minister who was his superior, and who directed him to accept a transfer of the money into his name as High Commissioner. The transfer was made by the respondent bank on September 20 and intimated to the appellant on the same day. I shall not consider the evidence in detail because I think that it is clear that the appellant was throughout acting under instructions in his official capacity. I can find no ground for the respondent's contention that the transfer was made to the appellant in his private capacity as an individual in whom the Finance Minister had confidence as a suitable person to hold the money.

The Court of Appeal decided that the action should not be stayed. They were of opinion that, even if the appellant was acting in his official capacity, he was only an agent, that he held the legal title to the money, that there can be no possession or

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[7] [1952] A.C. 582.

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control of a chose in action by anyone who does not hold the legal title, and that therefore there was no basis for Pakistan's claim to have the action stayed.

In my opinion, that is too narrow a view. On and after September 20, 1948, when the respondent bank opened the account in the name of "Habib Ibrahim Rahimtoola (High "Commissioner for Pakistan in London)," the position was that the appellant, as a servant or officer of the State of Pakistan, was bound to act upon any instructions regarding this money given to him by the appropriate Minister of that State. If the appellant for any reason failed or was unable to do so, then, in my judgment, Pakistan could have taken proceedings directly against the bank to recover the money. It is true that the appellant was the only person who could operate the account and that the bank was not bound to honour any cheque which was not signed by him. But that does not mean that there was no other way by which Pakistan could recover the money. Even if it be said that the form in which the account was opened was not sufficient notice to the bank that the appellant was acting merely as an officer or agent of Pakistan, that State was at least the undisclosed principal of the appellant. It is well settled that a principal, including an undisclosed principal, has a right to sue directly and in his own name. I can see no reason why this rule should not apply to banking, but it may well be that, if a bank declines to pay the principal without getting the authority of the agent who is its customer, the principal in suing the bank would have to make his agent a defendant in the action. And the principal would, of course, have to prove that the agent had in fact acted as his agent. It appears to me that Pakistan had an immediate and direct right to sue the bank in its own name for payment of this money and in that sense it had a legal title. It had full control of this chose in action.

I do not think that it is correct to regard the appellant as a trustee. If the appellant acted throughout as the servant or agent of Pakistan, I find it difficult to see how he could become a trustee for someone else. A trustee has the duty and right to hold the trust property and to prevent anyone from carrying it off. But the appellant could not have prevented Pakistan from suing for this money without his consent. That State had control. If anyone became a trustee by reason of the facts that to the knowledge of the Finance Minister of Hyderabad the appellant took the money as servant or agent of Pakistan, that no beneficial interest is claimed either by Pakistan or the appellant, and that they were later informed that the Nizam's property had been transferred without his authority, then the trustee must, I think, be the State of Pakistan itself. But that would not help the respondent, the Nizam.

We were referred to cases which show that the court will not halt the administration of an English trust because a foreign sovereign makes a claim in respect of the trust property but will not submit his claim to the jurisdiction of our courts. It may well be that the claim to sovereign immunity does not extend to such a case. But in these cases there was an independent trustee who was subject to our jurisdiction, and they appear to me to have no application to a case where the trustee is the sovereign himself. It would be quite inconsistent with the whole conception of sovereign immunity that we should require the sovereign to submit himself to our jurisdiction and seek to control him in his conduct of the trust which he has undertaken. If the State of Pakistan is a trustee then it must be left to that State to determine what its duty is.

We were also referred to a series of cases beginning with *Buller* v. *Harrison*,[8] where it was held that a person who has paid money to the agent of a person who wrongfully induced the payment may recover the money directly from the agent if the agent still has the money in his possession. Normally a person who claims repayment would have to sue the principal, and I have found nothing to suggest that these cases would apply to a case where the person claiming payment could not successfully sue the principal. In the present case the sovereign immunity of Pakistan would prevent an action against that State, and, even if the principle of *Buller* v. *Harrison* [9] applied to the circumstance of the payment in the present case, which I doubt, the fact that the principal could not be sued, in my view, excludes its application.

I have assumed that the appellant is to be regarded as merely the agent or servant of Pakistan. I do not find it necessary to consider the question whether a High Commissioner should be regarded as the representative of the State which he represents so that to implead him would be equivalent to impleading the State itself, or whether, if that were so, it would make a difference that the appellant ceased to be High Commissioner before the commencement of this action.

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[8] 2 Cowp. 565.

[9] Ibid.

The point at issue in this case can now be stated in a simple form. The State of Pakistan has a right to sue the respondent bank but Pakistan claims no beneficial right to the money owed by the bank. Does that entitle Pakistan to have this action stayed (1) in so far as it is directed against the appellant, and (2) in so far as it is directed against the respondent bank? I do not see any reason why the right of that State to claim sovereign immunity should depend on whether the bank account stands in the name of the State itself or stands in the name of its servant, agent or nominee. It was not disputed that, if the bank account had stood in the name of the State itself, the State could not have been made a party to this action against its will. It appears to me to follow that the State is entitled to object to its agent being made a party: the agent would merely be defending the action on behalf of his principal. I am therefore of opinion that the action must be stayed in so far as it is directed against the appellant, and I proceed to consider whether it can continue against the bank alone.

In a number of recent cases it has been necessary to consider in what circumstances a sovereign, who is not directly impleaded, is entitled to have an action stayed on the ground that it affects property in which the sovereign has or claims to have an interest. Most of these cases deal with ships or chattels and the only one dealing with a chose in action to which we were referred is *Haile Selassie* v. *Cable and Wireless Ltd.*[10] There the defendants owed money to the Emperor of Ethiopia. When the action was brought, the plaintiff was recognized by our Government as de jure sovereign and the King of Italy was recognized as de facto sovereign of that country. The de facto sovereign claimed the money and sought, unsuccessfully, to have the action stayed. In that case Greene M.R., in delivering the judgment of the Court of Appeal, said[11]: "The rule applies in the case both of "actions in personam and of actions in rem. But it has never "been extended to cover the case where the proceedings do not "involve either bringing the foreign sovereign before the court in "his own person or in that of his agent or interfering with his "proprietary or possessory rights in the event of judgment being "obtained. Where it is either admitted or proved that property "to which a claim is made either belongs to, or is in the possession of, a foreign sovereign, or his agent, the principle will apply. "But where property which is not proved or admitted to belong

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[10] [1938] Ch. 839; 54 T.L.R. 996; [1938] 3 All E.R. 384.

[11] [1938] Ch. 839, 844–845.

"to, or to be in the possession of, a foreign sovereign or his agent "is in the possession of a third party, and the plaintiff claims it "from that third party, and the issue in the action is whether "or not the property belongs to the plaintiff or to the foreign "sovereign, the very question to be decided is one which requires "to be answered in favour of the sovereign's title before it can "be asserted that that title is being questioned . . . It would be "a strange result if a person claiming property in the hands of, "or a debt alleged to be due by, a private individual in this "country were to be deprived of his right to have his claim "adjudicated upon by the courts merely because a claim to the "property, or the debt, had been put forward on behalf of a "foreign sovereign." That passage, if it were still fully authoritative, would go far to assist the present respondent, the Nizam. But it must now be read in light of the decisions of this House in the *Dollfus Mieg* case [12] and of the Privy Council in *Juan Ysmael & Co. Inc.* v. *Indonesian Government.*[13] In the latter case it is said [14]: "In their Lordships' opinion a foreign "government claiming that its interest in property will be "affected by the judgment in an action to which it is not a party, "is not bound as a condition of obtaining immunity to prove its "title to the interest claimed, but it must produce evidence to "satisfy the court that its claim is not merely illusory, nor "founded on a title manifestly defective." The fact that Pakistan does not claim a beneficial interest in this debt does not, in my view, make its claim merely illusory or its title manifestly defective.

The *Dollfus Mieg* case [15] shows that a sovereign can have an action stayed without having either a proprietary right in the sense of a beneficial right or a possessory right in the sense that the sovereign can effectively deal with the property at his own hand. In the *Dollfus Mieg* case [15] the gold bars were held by the bank. The bank could not be compelled by the Sovereign Governments, the bailors, to hand the gold bars over to them except by a judgment of the court, and it would not do so without either a judgment or the consent of Dollfus Mieg because if it had done so it would have laid itself open to an action of damages by Dollfus Mieg. Nevertheless, the Sovereign Governments were held entitled to have the action of Dollfus Mieg stayed and so to create a deadlock. Dollfus Mieg were prevented from recovering their property and the Sovereign Governments could not make good their right to immediate possession without doing the very thing that they objected to doing—submitting themselves to the jurisdiction of the English courts by suing the bank for delivery of the bars. Staying the present action may lead to a similar deadlock, but it is much too late now to argue that that is a good reason for not giving effect to the principle of sovereign immunity.

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[12] [1952] A.C. 582.

[13] [1955] A.C. 72; [1954] 3 All E.R. 236.

[14] [1955] A.C. 72, 89–90.

[15] [1952] A.C. 582.

It is true that Dollfus Mieg were permitted to proceed against the bank alone in an action of damages for conversion of 13 of the gold bars, which the bank had negligently failed to retain in their possession. The result of the bank's failure to retain possession of the gold bars was that it could be sued for damages both by Dollfus Mieg as owners of the bars and by the Sovereign Governments as bailors of the bars. The fact that Dollfus Mieg were permitted to pursue their action for damages does not appear to me to assist the present respondent. In the present case, the bank owes a single debt—the amount at the credit of the account in the name of the appellant. The question is to whom that debt should be paid. In order to succeed, the respondent, the Nizam, would have to displace the legal title and the right of the State of Pakistan to recover the money. In my judgment, an action for that purpose does directly affect the rights of that State and it cannot be allowed to proceed in the absence of that State or its representative.

The argument for the respondent, the Nizam, involves the proposition that, if a sovereign deposits with a bank both money and gold bars, in neither of which he claims a beneficial interest, and a third party sues the bank claiming to be owner of both, then, although the sovereign can found on the principle of immunity to prevent the action from proceeding with regard to the gold bars, he cannot prevent the action from proceeding with regard to the money. The principle of sovereign immunity is not founded on any technical rules of law: it is founded on broad considerations of public policy, international law and comity. While the differences between the rights of a bailor and the rights of a lender of money are of great importance in many respects. those differences do not appear to me to require or justify such a result. I would associate myself with the final observations of my noble and learned friend, Viscount Simonds. In my judgment this appeal should be allowed.

LORD COHEN. My Lords, I need not restate the facts.

The first question that arises is whether the action brought by the Nizam against the appellant and the bank should be stayed as against the appellant under the doctrine of sovereign immunity.

The second, which only arises if the first question is answered in the affirmative, is whether the action should be allowed to proceed against the bank.

Sir Andrew Clark submits that the first question should be answered in the negative on a number of grounds. He argues, in the first place, that the account opened by the bank in the name of the appellant was opened in his favour in his individual capacity and that the reference to "High Commissioner of "Pakistan" in the title of the account was merely descriptive and was not intended to connote any Pakistan Government interest in the account. This view appears to have commended itself to the Master of the Rolls and Birkett L.J., although they did not decide the matter in favour of the Nizam on this ground. I find it impossible to accept it as correct, in view of the affidavit evidence by the appellant, the accuracy of which is not challenged. In his first affidavit he says that it was agreed between the defendant Moin (who had been placed by the Nizam in control of the funds in question) and himself that the said funds should be transferred to him as the agent of the Government of Pakistan and that he accepted the transfer in accordance with the instructions of and as agent for his Government. In his second affidavit he is more explicit. Speaking of the interview at which the transfer was arranged and at which there was present, in addition to the defendant Moin and the appellant, Sir Mohamed Zafrullah Khan, the then Foreign Minister of Pakistan, he says that (1) the said Foreign Minister instructed him to accept the transfer of the said funds into an account in his name but described as the High Commissioner for Pakistan; (2) but for those express instructions he would never have agreed to the transfer; (3) it was never suggested to him that he should accept the said funds on his own account as a private individual as agent or trustee for the Nizam; (4) had such a suggestion been made he would have refused the transfer as he would have considered it improper to act in such a way while holding the position of High Commissioner.

In face of this evidence I am forced to the conclusion that when the appellant accepted the transfer of these funds he did so on behalf of the Government of Pakistan.

My Lords, in the Court of Appeal Romer L.J. accepted that the appellant did not take the transfer in his individual capacity, and then proceeded to consider whether, taking the transfer on behalf of the State of Pakistan, he did so as the alter ego of the State or merely as its servant or agent. Like Upjohn J., I do not think that in considering the application of the doctrine of sovereign immunity I ought to draw narrow distinctions. To make a distinction between a title to a debt in the name of the State and title to a debt in the name of the appellant as High Commissioner of the State would, in my opinion, be drawing a very narrow distinction. However, I am content, for the moment, to say that, having regard to the title of this account in the books of the bank, and to the circumstances in which the account was opened, the appellant was plainly the agent for the State of Pakistan and the State could have enforced the transfer to the State of the balance to the credit of the account, though the appellant might have been a necessary party to the proceedings.

Prima facie, therefore, a suit against the appellant in respect of this account affects the right or interest of the State of Pakistan. None the less, the Court of Appeal rejected the claim of the appellant to sovereign immunity on the basis of a principle stated in Halsbury's Laws of England, 3rd ed., vol. 1, p. 233, para. 522, in the following terms: "The receipt of money from a third "person by an agent on his principal's behalf, does not in itself "render the agent personally liable to repay it when the third "person becomes entitled as against the principal to repayment, "whether the money remains in the agent's hands or not. But "if a third person pays money to an agent under a mistake of "fact, or in consequence of some wrongful act, the agent is "personally liable to repay it, unless, before the claim for "repayment was made upon him, he has paid it to the principal "or done something equivalent to payment to his principal."

Applying that exception to the present case, Sir Andrew argued that (1) Moin acted wrongfully in transferring the funds to the appellant; (2) the appellant was the agent for the State of Pakistan and, before he had transferred the funds to his principal, the State, he had notice of Moin's wrongful act and knew that the Nizam was demanding the return of the money. Therefore, (3) the Nizam could recover the balance to the credit of the account from the appellant as money had and received without impleading the State of Pakistan directly or indirectly.

This argument was accepted by the Court of Appeal, Romer L.J. saying that the appellant could successfully escape from this position only by identifying himself with the State of Pakistan. My Lords, were it necessary to do so I should, I think, have regarded the evidence of the appellant as discharging this onus; but I do not think it is necessary to go so far. Like the Master of the Rolls and Birkett L.J., I am prepared to base my judgment on the citation made by them from the speech of Lord Radcliffe in *United States of America* v. *Dollfus Mieg et Cie S.A.*,[16] though I arrive at a different conclusion. I need not repeat that citation. I am prepared to accept that the effect of it is correctly stated by their Lordships in the following extract from their judgment[17]: "From this passage it sufficiently "appears, in our judgment, that the prohibition, which is of the "essence of the rule, is a prohibition against the assertion by the "English court of jurisdiction to entertain proceedings against a "sovereign who (or a sovereign State which) is unwilling to "submit to such jurisdiction. Whenever, therefore, the rule is "invoked in a proceeding to which the sovereign is not made or "sought to be made a party, but in which the subject-matter is "some property in regard to which the sovereign has or claims "some kind of right or interest, the applicability of the rule "depends upon the extent to which the prosecution of the claim "so affects the right or interest of the sovereign 'as to amount "'in one way or another to a suit against the sovereign.' The "proposition is imprecise, no doubt; but as Lord Radcliffe "observed, the law cannot be set at rest 'by any neat "'combination of words.'"

In my opinion, the suit instituted by the Nizam so affects the right or interest of the State of Pakistan as to make this case on a par with the *Dollfus Mieg* case.[18] True it is, as the Court of Appeal point out, that in that case the subject-matter of the suit was chattels, that in the case of chattels a sovereign State must act through individual agents and that this necessity does not apply in the case of a chose in action. In the case of a chose in action the question is, no doubt, one of title, not control, but, in my opinion, the effect of the transfer of the balance into an account in the name of "Habib Ibrahim Rahimtoola (High Com-"missioner for Pakistan in London)" was to vest in the State of Pakistan such title to the balance to the credit of that account as to make any suit against the appellant to recover that balance whether as "money held in trust for the plaintiff" or as "money "due and owing to the plaintiff" or "as money had and received "to the use of the plaintiff" a claim which amounts to a suit against a sovereign State.

[16] [1952] A.C. 582, 615–617.

[17] [1957] Ch. 185, 233–234.

[18] [1952] A.C. 582.

Before parting from this part of the case, I would call attention to two points. In the first place, it is to be observed that no question of sovereign immunity arose in any of the cases establishing the exception to the general rule stated in the passage from Halsbury's Laws of England which I have cited. It would be strange indeed if the applicability of the rule of sovereign immunity depended on whether the defendant was the sovereign or his agent.

Secondly, I would observe that this point was not taken before Upjohn J., and was only raised in reply in the Court of Appeal. It may, none the less, be a good point, but at least, in such circumstances, I may be allowed to suspect a flaw in the argument and to hope I have exposed it.

There remains the question whether what were called the trustee cases apply. If they do, it matters not whether the transferee was the appellant or the State of Pakistan. In either event Sir Andrew contended that he was entitled to maintain his suit on the ground that the English courts will not be deterred from administering a British trust by reason only that a beneficial interest in the trust fund is claimed by a sovereign State. His argument on this point was rejected by all the members of the Court of Appeal. I am content to express my agreement with them and to adopt the language of Romer L.J., where he says [19]: "I think those cases are only properly applicable where the court "finds a trust fund in the hands of a person who is an independent trustee, and that they should not be extended to cases in "which the person who controls the fund combines the character "of trustee with that of agent for the foreign State which is "setting up an interest in the fund. The contrary view, as it "seems to me, would stretch what has hitherto been regarded "as an exception to the doctrine to a point at which it ceases to "be reconcilable with the doctrine itself. An additional reason "why I should hesitate to hold that the exception applies is that "Pakistan has not sought to establish any beneficial interest in "the fund; its claim, as urged before the court, is limited to the "legal title to the fund and is founded upon agency, and not the "trusteeship, of Rahimtoola. Such a position, as I am inclined "to think, is outside the scope and ratio alike of the relevant "authorities which were brought to our attention."

My Lords, I agree with Upjohn J. in thinking the quotation he makes from Sir Robert Phillimore in *The Charkieh*[20] particularly applicable to the present case. It reads as follows: "The "object of international law, in this as in other matters, is not "to work injustice, not to prevent the enforcement of a just "demand, but to substitute negotiations between governments, "though they may be dilatory and the issue distant and uncertain, "for the ordinary use of courts of justice in cases where such "use would lessen the dignity or embarrass the functions of the "representatives of a foreign State." I would, therefore, stay the proceedings against the appellant.

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[19] [1957] Ch. 185, 250–251.

There remains the question whether the action should be allowed to proceed against the bank. In my opinion, it should not. On this point also I agree with Upjohn J. that proceedings must be stayed and for the reasons that he gives[21]: "With regard "to the bank, the plaintiffs are suing the bank for the debt due "at law to Rahimtoola. Proceedings must be stayed against "them, for to continue to sue them is to interfere with the "property of the sovereign. That is clearly the proper course "when dealing with a claim in detinue: see *Dollfus Mieg.*[22] "This cannot be likened to the case of a claim for damages for "conversion. In this case, unlike the claim in respect of the "13 bars of gold in the *Dollfus Mieg* case,[22] there is no claim "for damages against the bank, nor does this case resemble the "*Haile Selassie* case.[23] The question there was to whom were "Cable and Wireless Ltd. indebted. In this case, so far as the "bank is concerned, there is only one answer to that question— "Rahimtoola. Both Moin and Miz had authority to operate the "account, and the statement of claim does not allege that the "bank had any knowledge of the alleged but, as I have held, "unproved breaches of duty by Moin or Miz. The plaintiffs "can only reach the debt through Rahimtoola. Therefore the "action against the bank must be stayed."

True it is that evidence not available to Upjohn J. was produced to the Court of Appeal establishing a prima facie case that Moin had been guilty of a breach of duty, but he was acting within the scope of his ostensible authority and neither the bank nor the appellant was aware of the alleged excess of authority when the account was transferred to the appellant. I do not think, therefore, the alleged excess of authority affords any reason why the action should be allowed to proceed against the bank.

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[20] (1873) L.R. 4 A. & E. 59, 97.

[21] [1957] Ch. 185, 209–210; [1956] 3 All E.R. 311.

[22] [1952] A.C. 582.

[23] [1938] Ch. 839.

For these reasons, as well as for the reasons given by your Lordships, I would allow the appeal. I only desire to add that I entirely agree with the concluding observations of my noble and learned friend on the Woolsack.

LORD SOMERVELL OF HARROW. My Lords, I agree with the opinion of my noble and learned friend, Lord Reid, which has just been given. I would also like to associate myself with the concluding observations of my noble and learned friend on the Woolsack.

I wish only to add a few words on the decision in *Haile Selassie* v. *Cable and Wireless Ltd.*[24] I would agree that it is not sufficient for a foreign sovereign, in cases where the facts do not speak for themselves, simply to claim. On the other hand, there would be no "immunity" if the foreign sovereign had to *prove* its title. I respectfully do not accept the statements to this effect in the speech of Lord Maugham in *The Cristina.*[25] This passage, which was in its context a dictum, was cited with approval in the *Haile Selassie* case.[26] The foreign sovereign must, in my opinion, establish an arguable issue.

The decision in the *Haile Selassie* case[26] was based on a further ground. This, it was said, is not a case of property, possession or control of a chattel. The Italian Government is not a necessary party to the action. That, of course, is true. It is also true that a decision in favour of Haile Selassie would not have been pleadable as res judicata against the Italian Government.

The contract was made in 1935 at a time when the plaintiff was sovereign. The telegraphic station, the operation of which gave rise to the dues claimed, was closed on May 2, 1936, one day after the plaintiff left the country and seven days before the King of Italy proclaimed the annexation of the territory. The writ was issued on January 4, 1937. On that date His Majesty's Government recognized the plaintiff as de jure, and the King of Italy as de facto, sovereign of Ethiopia. The issue was between the de jure and de facto sovereigns. The Court of Appeal decided that the claim by Haile Selassie was to proceed in the absence of the Italian Government, the defendant having raised the defence that by reason of the conquest of Ethiopia the right to recover the sum claimed had vested in the King of Italy. The court, if the case had proceeded to trial, would have had to decide whether it had become so vested or not. If the decision was in favour of the plaintiff the court would presumably have decided that, having regard to international law, the nature of the agreement and the dates and so on, the King of Italy had no claim. It does not seem to me satisfactory to say that this is not indirectly impleading a foreign sovereign because he is not estopped by res judicata. It also puts or may put the defendant in a position in which I would prefer he should not be placed. He cannot interplead because one claimant is a foreign sovereign, but he may have to pay twice over.

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[24] [1938] Ch. 839.

[25] [1938] A.C. 485, 516; 54 T.L.R. 512; [1938] 1 All E.R. 719.

[26] [1938] Ch. 839, 848.

If and in so far as the decision proceeded on the principle as stated above, I would wish to reserve the point.

LORD DENNING. My Lords, if the State of Pakistan succeed in this case in putting up the " protective umbrella " of sovereign immunity, it will be the first time, so far as I know, that the courts of this country have ever allowed it to be raised to ward off a claim to a debt or a chose in action situate here on the ground that a foreign Government own or control it. Your Lordships have heretofore allowed it to be raised in regard to a ship destined for public purposes, and in regard to gold bars likewise destined, but never before in regard to a debt.

Much of the argument in the courts below and before your Lordships was dominated by the question, To whom does this money—this debt—belong? That question was asked, no doubt, because of the rule stated in Dicey and the " two propositions " of international law " formulated by Lord Atkin which, so far as applicable to this case, come down to this: Is this debt the property of the State of Pakistan? or alternatively, Is that State in control of it? for, if so, the action must be stayed.

Mr. MacKenna argued that the debt was the property of Pakistan because it had the legal title to it. He said that Pakistan could sue the bank at law in its own name for it, or, at any rate, that Rahimtoola could sue for it, and Rahimtoola was the agent of Pakistan.

The legal title to the debt was originally in the Nizam of Hyderabad. It was assigned by his Finance Minister, acting within the scope of his ostensible authority, to Rahimtoola or to Pakistan—I will consider which in a moment—and that assignment was effective to pass the legal title to the transferee. So much was admitted by Sir Andrew Clark, but, as I pointed out during the argument, the assignment was not complete and perfect so as to pass the legal title until the bank attorned to the

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transferee. At any moment up to the attornment, the Nizam could have countermanded the instructions to the bank and no one could say him nay: see *Gibson* v. *Minet.*[27] Neither Rahimtoola nor Pakistan could have objected up to that point for the simple reason that they gave no value. They paid nothing for the debt. They gave up nothing. They promised nothing. And they could not say that there was a legal assignment within section 136 of the Law of Property Act, 1925, seeing that the arrangements for the transfer were all made by word of mouth. There was nothing in the nature of an "absolute assignment "by writing." There was only notice in writing to the debtor. Nevertheless, as soon as the assignment was perfected by the attornment of the bank to the transferee, the legal title passed, for the money was thenceforward held by the bank to the use of the named transferee and could be recovered by him from the bank, not in an action of simple contract but in an action of debt or for money had and received to his use: see *Clark's Case* [28] and *Liversidge* v. *Broadbent.*[29] A few days after the attornment—before, indeed, it had been acknowledged by the transferee—the Nizam countermanded the instructions to the bank, but it was then too late to stop the legal title passing.

The transfer being good, however, the question is, To whom was the legal title transferred? Was it to Rahimtoola? Or to the State of Pakistan? This is a question of construction. The named transferee here was not the State of Pakistan but Rahimtoola himself. True, he was described in brackets as "(High "Commissioner for Pakistan in London)." That is a description of his office and shows that he was acting in an official capacity. It shows, indeed, that he was an agent. But he still remained the named transferee. If he had been so named and described in a transfer of land or of shares, or in the assignment of an insurance policy, or in a bill of exchange as the payee or indorsee to whom the money was to be paid, there could be no doubt that the legal title would pass to him and not to Pakistan: see *Hinson* v. *Burridge* [30] (point 1). So also in this transfer the legal title passed to Rahimtoola. If Pakistan had desired to have the legal title in itself, it should have taken care to have the account transferred into its own name, but it did not do so and must take the consequences, just as the principals had to do in *Sims* v. *Brittain* [31] and *Sims* v. *Bond.*[32] On the wording of the transfer

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[27] (1824) 2 Bing. 7.

[28] (1614) Godb. 210.

[29] (1859) 4 H. & N. 603, 612.

[30] (1595) Moore K.B. 701.

[31] (1832) 4 B. & Ad. 375, 378.

[32] (1833) 5 B. & Ad. 389, 394.

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here, as it stands, Rahimtoola was in law the named transferee just as effectively as if the description "High Commissioner" had been omitted. He was the customer of the bank and the sole person entitled to operate the account. If the Foreign Minister of Pakistan had purported to give instructions to the bank, they could properly reply: "If you want anything done with this "account, you must tell Rahimtoola and let *him* give us the "instructions. He is our customer and the only person we know "in this matter."

Mr. MacKenna argued, however, before your Lordships—not, I believe, in the courts below—that Pakistan was entitled to sue the bank at law in its own name, without joining Rahimtoola as a party, because it was his principal in the matter. This might be a tenable argument if Pakistan could show that it was the real contracting party who was lending its money to the bank. That appears from the case of *Cooke* v. *Seeley*,[33] on which Mr. MacKenna so much relied. But it is not this case. The real contracting party here was the Nizam of Hyderabad, who lent his money to the bank. He, through his Finance Minister, transferred the debt to Rahimtoola, and thereupon Rahimtoola acquired the legal title as transferee, not as contractee. It is just the same as when any piece of property is transferred into the name of a transferee who is acting on behalf of a principal, such as shares transferred to a nominee. The principal, when he is the beneficial owner, is entitled to intervene in equity to protect his interests, but he is not entitled to sue at law without joining the legal owner as a party: see *Performing Right Society Ltd.* v. *London Theatre of Varieties Ltd.*[34] Here, however, Pakistan was not even the beneficial owner. The only way in which Pakistan might sue the bank alone is if it could show a contract of novation to which it was a principal, with consideration to support it, but none such was ever alleged or proved. In the motion to stay it was only the transfer that was relied upon.

In the result, I find myself in full agreement with all the judges in the courts below that, upon the transfer, the legal title to the debt became vested in Rahimtoola and not in Pakistan. And as Pakistan admittedly had no beneficial interest, I should have thought that it could not sue in its own name at all, but only in the name of Rahimtoola. Howsoever that may be, it by no means disposes of Pakistan's claim. That State says that, even so, Rahimtoola was its agent and it could tell him what to do with the debt, in particular, whether to sue for it or not, and it could require him to collect the money and hand it over. "In "effect," therefore, the property was in Pakistan or at any rate it was in its control.

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[33] (1848) 2 Ex. 746.

[34] [1924] A.C. 1; 40 T.L.R. 52.

That is a formidable argument, which Upjohn J. accepted, and it was only rejected by the Court of Appeal because it was displaced by new evidence adduced by the Nizam. This was to the effect that the Finance Minister of Hyderabad made the transfer wrongfully in breach of his duty to the Nizam and without any authority from the Nizam in fact. As soon as the Nizam got to know of it—it was within a very few days—and before any money had been withdrawn from the bank, the Nizam gave notice to the bank that the Finance Minister had no authority to make the transfer and asked for it to be retransferred. The bank did not retransfer it but they did not hand it to anyone else. They still have the money.

On this new evidence (which was not controverted) Sir Andrew Clark argued before the Court of Appeal that any kind of title or control in Pakistan had disappeared. It had been superseded by the right of the Nizam to recover the money from Rahimtoola in an action for money had and received. He referred to *Buller* v. *Harrison* [35] for this purpose. Before your Lordships Sir Andrew went further and contended that the Nizam could recover the money at law from the bank likewise. He did not adduce any specific authority for that proposition, but I think it is plainly correct. The matter can be tested by taking a fictitious illustration which I only take because it comes from a decided case and throws the legal points into sharp relief. Suppose the Finance Minister had transferred the money to a lady of high standing whose official position was stated on the transfer, the transfer being within his ostensible authority but without actual authority, and it was later discovered that the lady was his mistress and the transfer made for no consideration. As soon as the bank were told that the transfer was wrongful and unauthorized, they would be bound to return the money to the Nizam. The Nizam could clearly recover the money from the bank, if they still had it in their hands or from the mistress if she had got it, or, indeed, from any person who received it from her, except one who received it in good faith and for valuable consideration. That is shown by the well-known decision of the Court of Appeal in *Banque Belge pour l'Etranger* v. *Hambrouck*.[36] The gist of it is that an agent, acting within his ostensible authority but without actual authority, handed over his master's money for no consideration. The judgment of Atkin L.J. shows that he regarded such a transaction as voidable and not void. The named transferee obtained a title to the money until the plaintiff elected to avoid it, whereupon the title revested in the plaintiff subject to any title acquired in the meantime by any subsequent transferee for value without notice. So here, when the Nizam elected to avoid this transaction, the title revested in him so that he can sue the bank for the money which they still hold, but Rahimtoola ought to be joined as a defendant so that the bank may be protected from any claim by him, and he may have an opportunity of controverting the facts if he wishes to do so.

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[35] 2 Cowp. 565.

[36] [1921] 1 K.B. 321; 37 T.L.R. 76.

Sir Andrew Clark made a further point which appealed particularly to Romer L.J. There being no consideration for this transfer, and it not being a gift, the money was clearly held by the legal owner, Rahimtoola, on a resulting trust for the Nizam. That gives the Nizam a right of control over it which overrides any claim which Pakistan may have, as principal, to give directions to Rahimtoola.

Those arguments of Sir Andrew Clark appear to me to be very strong, as they appeared also to the Court of Appeal. Indeed, if it is open to the Nizam to displace the claim of Pakistan by showing a legal title in himself or an equitable title, I think he has done so. He has shown both, and if the matter stopped there I should have found myself in agreement with the Court of Appeal.

But the question is whether it is open to the Nizam so to displace the claim of Pakistan when that State declines to litigate about it. This throws us back, I think, to the rules which govern sovereign immunity.

It has sometimes been supposed that there is an absolute rule that a foreign Government cannot be impleaded in our courts in any circumstances, and, as a corollary, that it cannot be asked to come to our courts to litigate about its interest in property. That is supposed to be the result of Dicey's rule and Lord Atkin's two set propositions. But there are difficulties in it. To begin with, the rule about " not impleading a foreign Government " is by no means universal or absolute, as I will show. In the next place, the rule about " property " only applies, I think, to property which plainly or admittedly belongs to a foreign sovereign, or plainly or admittedly is in his possession or control. It is not appropriate in cases such as the present where the question " To "whom does this debt belong?" "Whose property is it?" is the very question which has to be decided in the action. It cannot also be the question which has to be decided on a summons to stay. It is obvious that, if that is the question to be decided by the courts, it ought to be decided at the trial—or, at any rate, at *a* trial—after full discovery and examination of witnesses, instead of being done imperfectly at this preliminary stage with no discovery and on insufficient materials. Lord Maugham was of that opinion. He thought the foreign Government ought to *prove* its title. But if that is to be done, there is no point in a stay. You might as well have the trial anyway.

What is the alternative? If the foreign Government has not to prove its title, will a mere claim by it suffice? That is the only logical alternative, as Scrutton L.J. perceived. He pointed out that if the foreign Government is not to be impleaded, directly or indirectly, it must not be called upon for proof of anything, not even to show good cause: see *The Jupiter*.[37] But the Privy Council have refused to carry the rule about "not impleading a "foreign Government" to that absolute extreme. It would be far too unjust to a plaintiff in an English court: see *Juan Ysmael & Co. Inc.* v. *Indonesian Government*.[38] But is there any halfway house? The Privy Council there said[39] that a foreign Government is not bound to prove its title "but it must produce "evidence to satisfy the court that its claim is not merely illusory, "nor founded on a title manifestly defective." Even this leaves many questions unanswered. What degree of evidence is needed for this purpose? And if the foreign Government produces some evidence, is it not open to the plaintiff to displace it? And if the plaintiff does succeed in displacing it (as the Nizam did here)—so that on the uncontroverted affidavits there is no longer an arguable issue—is the foreign Government still entitled to a stay?

Again, what does the rule mean when it speaks of "property" and "control"? Suppose that a legal title is in Pakistan or its agent, does it follow that the debt is "property" which belongs to it? It can well be argued that Pakistan should not be entitled to sovereign immunity simply because it has a bare legal title without any equitable right. The Cour de Cassation in France would not grant immunity on such a ground: see *Procureur Général près la Cour de Cassation* v. *Vestwig*.[40] And can Pakistan be said to have "control" over the debt when the Nizam has a good equitable title which has priority in the courts over any direction that Pakistan may give to its agent?

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[37] [1924] P. 236, 243; 40 T.L.R. 815.

[38] [1955] A.C. 72.

[39] Ibid. 89.

[40] (1946) Sirey Recueil Général, 1947, I, 137; Annual Digest and Reports of Public International Law Cases, 1946, Case No. 32, p. 78.

And where is the line to be drawn between an agent who is the "organ or alter ego" of a foreign Government and one who is not? Into which category did Rahimtoola, the High Commissioner, fall? It is said that, if he was an "organ" of the State, the transfer to him was equivalent to a transfer to the State of Pakistan itself and that automatically entitles it to a stay; whereas, if he was only an agent, it must produce evidence to satisfy the rule about "property." I agree with the Court of Appeal that Rahimtoola cannot be regarded as an "organ or "alter ego," but I find it difficult to reconcile this with the decision in *Baccus S.R.L.* v. *Servicio Nacional del Trigo*,[41] as to which I would only say that I should have thought that a separate legal entity which carried on commercial transactions for a State was an agent, and not an organ, of the Government, and that it was only if it was an "organ or alter ego" that it could not be impleaded.

And why, I ask, should sovereign immunity depend on the finer points of our domestic law? It is a strange proposition of international law which depends for its application on whether a satisfied judgment in trover changes the property in the goods (the point which apparently turned the scale in the *Dollfus Mieg* case[42]), or on whether the principal of a transferee can sue in his own name for cash at bank (a point which looms large in the present case). The comity of nations is not offended more or less according to the way such points are resolved.

Such are the difficulties in the existing rules. I can see no satisfactory answer to them. They are so great that I think we should go back and look for the principles which lie behind the doctrine of sovereign immunity. Search as you will among the accepted sources of international law and you will search in vain for any set propositions. There is no agreed principle except this: that each State ought to have proper respect for the dignity and independence of other States. Beyond that principle there is no common ground. It is left to each State to apply the principle in its own way, and each has applied it differently. Some have adopted a rule of absolute immunity which, if carried to its logical extreme, is in danger of becoming an instrument of injustice. Others have adopted a rule of immunity for public

[41] [1957] 1 Q.B. 438; [1956] 3 All E.R. 715.

[42] [1952] A.C. 582.

acts but not for private acts, which has turned out to be a most elusive test. All admit exceptions. There is no uniform practice. There is no uniform rule. So there is no help there.

Search now among the decisions of the English courts and you will not find them consistent. They seem to have different rules about " property " according to the subject-matter. On the one hand, there are the cases about ships and other specific chattels. In these cases the courts have tended to apply the rule of absolute immunity. This rule was formed in the days when no action lay against the sovereign in any circumstances. It was thought to offend the dignity of a sovereign and to impinge on his independence if his subjects were allowed to sue him in his own courts. Likewise if he were sued in the courts of another country. Proper respect for sovereign power therefore required that a sovereign should not be impleaded, directly or indirectly, in the courts of his own or any other country without his consent. These cases have received a check lately by the case of *Sultan of Johore* v. *Abubakar Tunku Aris Bendahar*,[43] where the Privy Council rejected the notion that there was any absolute rule about " not " impleading a foreign Government."

On the other hand, there are the decisions about trust funds and other debts. These have a modern look about them. It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decisions of courts of acknowledged impartiality than by arbitrarily rejecting their jurisdiction. In all civilized countries there has been a progressive tendency towards making the sovereign liable to be sued in his own courts; notably in England by the Crown Proceedings Act, 1947. Foreign sovereigns should not be in any different position. There is no reason why we should grant to the departments or agencies of foreign Governments an immunity which we do not grant our own, provided always that the matter in dispute arises within the jurisdiction of our courts and is properly cognizable by them.

This difference of treatment according to subject-matter is seen very noticeably in the *Dollfus Mieg* case,[44] on which both sides relied. Mr. MacKenna relied on the decision of this House about the 51 gold bars, whereas Sir Andrew Clark relied on the decision about the remaining 13. It is indeed the fact that a stay was granted in respect of the 51 gold bars which were still specific chattels, but not in respect of the remaining 13 which had, by mistake, been sold and melted down, leaving only a chose in action. And there seems, from the report, no difference between them except subject-matter. It must be remembered that the claim against the bank, as finally formulated, was not for delivery of the 64 gold bars but for damages for their conversion. The evidence of conversion of the 51 was the refusal to deliver them, and of the 13 was the sale of them. This difference did not affect the substance of the dispute. It did not matter to the rival claimants whether they received the specific gold bars or the equivalent value in cash. Wherein, then, lies the difference unless it be in subject-matter; that is, in the difference between specific chattels and a chose in action? And the speeches in this House bear this out.

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[43] [1952] A.C. 318, 343–344; [1952] 1 T.L.R. 1106; [1952] 1 All E.R. 1261.

[44] [1952] A.C. 582.

The reason for granting immunity in respect of the 51 bars was because the Sovereign Governments had the right to immediate possession of them and were entitled to have their bailees kept immune from suit in respect of them, whatever the form of action, whether it was for delivery of the specific 51 bars or for damages for their conversion. Lord Radcliffe said that the Admiralty decisions about ships had much more bearing than the Chancery decisions about trust funds. The 51 bars were specific chattels, and, if the plaintiffs obtained damages for conversion of them, the bank would be able to set up the plaintiffs' title against the Sovereign Governments, and that would materially affect the existing right of the Sovereign Governments to possession of them.

The reason for refusing immunity in respect of the 13 bars was because, as Lord Tucker put it,[45] the bank, by its own act, had " put an end to the bailment which *alone* afforded the protec-" tive umbrella of immunity." It is instructive to consider the consequences. The action by the Dollfus Mieg company was allowed to continue against the bank for conversion of the 13 bars. Yet it is obvious that the Sovereign Governments could also bring an action against the bank for conversion of the same 13 bars, and in that action the bank could not dispute the bailor's title. No system of jurisprudence could view with equanimity the prospect of the bank being made liable twice over for one and the same conversion. The bank would have a clear right to interplead by inviting the Sovereign Governments to come in and either to maintain or relinquish their claim, or else be barred:

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[45] [1952] A.C. 582, 622–623.

see R.S.C., Ord. 57, rr. 1, 3, 5, 10. The rule about "not "impleading a foreign Government" would not be applied so rigidly or so absolutely as to obstruct the justice of that course. The Sovereign Governments, having no immunity in respect of the 13 bars, would therefore have been compelled to come in or lose their right. Even if the bank had not sought to interplead and the Dollfus Mieg company had obtained judgment against the bank (or against the purchasers of the 13 bars), then on satisfaction by the bank of the judgment (or of the claim of the purchasers for indemnity) the bank could set up the title of the Dollfus Mieg company against the Sovereign Governments, because a satisfied judgment in trover changes the property in the goods (see *Brinsmead* v. *Harrison*[46]) and is equivalent to eviction by title paramount: see *Biddle* v. *Bond*.[47] So the Sovereign Governments would be prejudiced by the continuance of the action. Yet this House allowed it to continue.

I have dealt at some length with the position of the 13 bars because it seems to me to be a direct decision of this House about a chose in action. So regarded, the decision falls into line with the decisions of the Court of Chancery about a trust fund or a debt. It has been held, I think rightly, that the court must administer a trust fund which is here in the hands of an English trustee, even though a foreign sovereign is known to claim an interest in it. This is only simple justice to the English trustee and beneficiaries. The court cannot allow the fund to lie stagnant for ever because one of the claimants is a foreign sovereign. In such a case the court does not issue process to the foreign sovereign. It simply gives him notice of the proceedings: see *Strousberg* v. *Republic of Costa Rica*,[48] by James L.J. If he, after being given an invitation, does not choose to come to our courts to make good his claim, the court will adjudicate as best it can in his absence, and he will be bound by the decision. Lord Langdale intimated as much in *Duke of Brunswick* v. *King of Hanover*,[49] and so did Lord Hatherley L.C. in *Larivière* v. *Morgan*.[50] Likewise with an English debt due in England to a creditor who comes to our courts to enforce it. If a foreign Government wishes to claim the debt, it ought, on being invited, to come to our courts to make good its claim. It cannot ask for the action to be stayed and do nothing more, because that would mean that the debt would remain unpaid for ever, which would be unjust to all others concerned. The creditor's action must therefore be allowed to continue, and in that action the claim of the foreign Government can be adjudicated upon in its absence: see *Haile Selassie* v. *Cable and Wireless Ltd.*,[51] by Lord Greene. If the English creditor succeeds and is paid, and the foreign Government should afterwards seek to make the debtor pay the debt twice over, our courts would not permit it. Seeing that the foreign Government had refused to do the debtor the justice of coming in when given the chance, our courts would not permit it "to commit that injustice against him." Those were Lord Eldon's words in *Stevenson* v. *Anderson*,[52] a case of interpleader, which Lord Hatherley said had a great analogy. And if the foreign Government should seek to sue the debtor in any foreign court, I would assume, as Lord Hatherley did,[53] "that the courts of all "countries would recognize the decision of a court of competent "jurisdiction in a country where the property was situated, and "where the rights were properly to be tried."

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[46] (1871) L.R. 6 C.P. 584.

[47] (1865) 6 B. & S. 225.

[48] (1881) 44 L.T. 199, 201.

[49] (1844) 6 Beav. 1, 39.

[50] (1872) L.R. 7 Ch. 550, 560; affirmed by (1875) L.R. 7 H.L. 423.

So much for our English decisions. If it were necessary in this case to choose between the Admiralty decisions and the Chancery decisions, I should have thought that the Chancery decisions had much more bearing. If the Nizam of Hyderabad is not allowed to proceed with this action, the money will lie stagnant in the bank and the debt may remain unpaid for ever. The bank cannot safely pay either Rahimtoola or the State of Pakistan because, once it does so, there will clearly thenceforward be no immunity available to protect the bank. The bank must wait until it is sued by Rahimtoola or the State of Pakistan: and once that is done, the State automatically waives its immunity. If Pakistan succeeds in getting a stay, therefore, it means that it does not choose to sue for the debt itself: and yet by claiming immunity, it can prevent the Nizam from ever getting the money: and it can prevent the bank from ever getting a good discharge. That would not seem to be right. It creates a stalemate. The only way to break it is to allow the Nizam to continue the action but to protect the bank by having Rahimtoola as a party, which has been done. On this ground also I would have been in favour of supporting the decision of the Court of Appeal but for one thing to which I now come.

I do not think it is right to resolve this case by asking whether it is more like the Admiralty decisions or the Chancery decisions, or whether it is more like the 51 gold bars or the 13 gold bars, or whether it concerns a specific chattel or a chose in action. Such distinctions do not touch the root of the problem. Faced with an inconsistency between two lines of cases, the only course is to see which is more consistent with principle. For this I go back, as Upjohn J. did, to the words of that great international lawyer, Sir Robert Phillimore, in *The Charkieh*,[54] who, after a full review of the authorities, said this: "The object of international law, in this as in other matters is not to work injustice, "not to prevent the enforcement of a just demand, but to "substitute negotiations between governments, though they may "be dilatory and the issue distant and uncertain, for the ordinary "use of courts of justice in cases where such use would lessen "the dignity or embarrass the functions of the representatives of "a foreign State." Applying this principle, it seems to me that at the present time sovereign immunity should not depend on whether a foreign government is impleaded, directly or indirectly, but rather on the nature of the dispute. Not on whether "conflicting rights have to be decided," but on the nature of the conflict. Is it properly cognizable by our courts or not? If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country: but if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried on by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity.

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[51] [1938] Ch. 839, 845.

[52] (1814) 2 V. & B. 407, 412.

[53] L.R. 7 Ch. 550, 561.

Such a test, if accepted, would enable the difficulties presented by the *Dollfus Mieg* case[55] to be resolved. The dispute about the 51 gold bars brought into question an international transaction. During the war the bars had been looted by the enemy but recaptured by the Allied forces, and they were held by the Sovereign Governments in a pool for disposal according to international agreement: see the facts stated.[56] It would not be right for our courts to listen to an attempt to remove them from the pool without the consent of the Sovereign Governments. Whereas the 13 bars had been removed from the pool by the bank's own act and the claim of the Dollfus Mieg company could be regarded as a simple claim for a wrong done by the bank devoid of any international element. It was therefore properly cognizable by our courts.

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[54] L.R. 4 A. & E. 59, 97.

[55] [1952] A.C. 582.

[56] [1949] Ch. 369, 370–378; [1949] 1 All E.R. 946.

I would therefore for myself approach this case somewhat broadly and ask whether the dispute is one properly cognizable by our courts: and I would test it by asking what would be the position if the transaction had taken place, not between the Finance Minister of Hyderabad and the Foreign Secretary of Pakistan, but between the Finance Minister of Hyderabad and the Foreign Secretary of Great Britain, and the money had been transferred, not into the name of the High Commissioner of Pakistan, but into the name of a high officer such as a Custodian of Property? Would an action lie in our courts for the return of the money? Clearly not. The transaction was more in the nature of a treaty than a contract or a trust. Reference would be made to such well-known cases as *Nabob of the Carnatic* v. *East India Co.*[57] and *Civilian War Claimants Association Ltd.* v. *The King*[58] to show that no action would lie for money had and received or upon a trust. The court would not listen to an inquiry whether the Finance Minister of Hyderabad had authority to make the transfer. It would say that any representations to that effect must be made to the Crown and not to the courts. If our courts would not in like circumstances entertain an action against our own Government or its agent, they should not entertain an action against the State of Pakistan or its agent. Upjohn J. put the point in a sentence when he said[59]: "The "present transaction was an inter-governmental transaction; let "it be solved by inter-governmental negotiations." That is the kernel of the matter. I agree with it and would allow the appeal.

My Lords, I acknowledge that, in the course of this opinion, I have considered some questions and authorities which were not mentioned by counsel. I am sure they gave all the help they could and I have only gone into it further because the law on this subject is of great consequence and, as applied at present, it is held by many to be unsatisfactory. I venture to think that if there is one place where it should be reconsidered on principle—without being tied to particular precedents of a period that is past—it is here in this House: and if there is one time for it to

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[57] (1792–3) 2 Ves. 56.

[58] [1932] A.C. 14; 48 T.L.R. 83.

[59] [1957] Ch. 185, 209.

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be done, it is now, when the opportunity offers, before the law gets any more enmeshed in its own net. This I have tried to do. Whatever the outcome, I hope I may say, as Holt C.J. once did after he had done much research on his own: "I have stirred "these points, which wiser heads in time may settle."[60]

Appeal allowed.

Solicitors: *Sanderson, Lee, Morgan, Price & Co.; Bailey & Co.; Freshfields.*

F. C.

[60] (1703) 2 Ld.Raym. 909, 920 (*Coggs* v. *Bernard*).

J. C.*
1958
April 23; *June* 3.

DON THOMAS SAMARATUNGA . . . APPELLANT;

AND

THE QUEEN . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Perjury—Summary statutory powers of court—Construction and scope—Summary committal as for contempt—Criminal Procedure Code (Legislative Enactments of Ceylon, 1938, *c.* 16), *ss.* 439 (1), 440 (1)—*Penal Code (Legislative Enactments of Ceylon,* 1938, *c.* 15), *s.* 188.

By section 440 of the Ceylon Criminal Procedure Code: "(1) If "any person giving evidence . . . in open court in any judicial pro- "ceeding under this Code gives, in the opinion of the court before "which the judicial proceeding is held, false evidence within the "meaning of section 188 of the Penal Code it shall be lawful for "the court, if such court be the Supreme Court, summarily to "sentence such witness as for a contempt of the court to imprison- "ment . . . for any period not exceeding three months . . . ":—

Held, that from its nature the summary power conferred by section 440 (1) is one which should only be used when the judge is, as stated in *Subramaniam* v. *The Queen* [1956] 1 W.L.R. 456 at 460, "clear beyond doubt" that the witness has given false evidence as defined. Subject to that overriding principle, it was correctly stated in *Banda* v. *Sada* (1914) 17 N.L.R. 510 at 512, in relation to the interpretation and scope of the section, that "the legislature

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* *Present*: VISCOUNT SIMONDS, LORD COHEN, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW and the RT. HON. L. M. D. DE SILVA.

"has left the courts quite free as a matter of law to deal under "that section with any form of 'false evidence' within the meaning "of section 188 of the Penal Code, and if we attempt to fetter that "discretion by rigid general rules as to the class of cases in which "it may or may not be exercised, we shall be . . . running the risk "of paralysing the operation of a statutory power, the maintenance "of which in full working order is essential to the administration "of justice in this country . . . and we have every right to consider "ourselves . . . [entitled] to inquire whether this statutory power "can be safely exercised in any particular case."

Chang Hang Kiu v. *Piggott* [1909] A.C. 312; 25 T.L.R. 381 considered.

Subramaniam v. *The Queen* (supra) distinguished.

A commissioner of assize of the Supreme Court of Ceylon, with a view to determining the appropriate sentence to be passed on a man on trial before him who pleaded guilty to a charge under section 439 (1) of the Criminal Procedure Code of having given false evidence in proceedings in which the appellant had been charged with and acquitted of aiding and abetting an attempted murder, himself called the appellant and others as witnesses. The commissioner, having come to the conclusion that the appellant in giving his evidence was deliberately lying, summarily sentenced him to three months' rigorous imprisonment:—

Held, that the commissioner was entitled to act, and had rightly acted, under the summary power conferred by section 440 (1) of the Criminal Procedure Code.

Order of the commissioner of assize (Dr. H. W. Tambiah Q.C.) affirmed.

APPEAL (No. 27 of 1957), by special leave, from an order (June 15, 1957) of Dr. H. W. Tambiah Q.C., a commissioner of assize for the Supreme Court of Ceylon, sentencing the appellant to three months' rigorous imprisonment for having given false evidence during the course of a criminal trial. The order was made under the powers conferred by section 440 (1) of the Criminal Procedure Code. That section read as follows: "440.—(1) If any "person giving evidence on any subject in open court in any "judicial proceeding under this Code gives, in the opinion of the "court before which the judicial proceeding is held, false evidence "within the meaning of section 188 of the Penal Code it shall be "lawful for the court, if such court be the Supreme Court, sum-"marily to sentence such witness as for a contempt of the court to "imprisonment either simple or rigorous for any period not "exceeding three months or to fine such witness in any sum not "exceeding two hundred rupees; or if such court be an inferior "court to order such witness to pay a fine not exceeding fifty "rupees and in default of payment of such fine to undergo

" rigorous imprisonment for any period not exceeding two months. " Whenever the power given by this section is exercised by a " court other than the Supreme Court the judge or magistrate of " such court shall record the reasons for imposing such fine. " (2) Any person who has undergone any sentence of imprisonment or paid any fine imposed under this section shall not be " liable to be punished again for the same offence. (3) Any person " against whom any order is made by any court other than the " Supreme Court under subsection (1) of this section may appeal " to the Supreme Court and every such appeal shall be subject " to the provisions of this Code. (4) In lieu of exercising the " power given by this section the court may if it thinks fit transmit " the record of the judicial proceeding to the Attorney-General " to enable him to exercise the powers conferred on him by this " Code or proceed in manner provided by section 380. (5) Nothing " in this section contained shall be construed as derogating from " or limiting the powers and jurisdiction of the Supreme Court or " the judges thereof."

Section 188 of the Penal Code was as follows: " 188. Whoever, " being legally bound by an oath or affirmation, or by any express " provision of law to state the truth, or being bound by law to " make a declaration upon any subject, makes any statement " which is false, and which he either knows or believes to be false, " or does not believe to be true, is said to give ' false evidence.' " Wherever in any Ordinance the word ' perjury ' occurs, such " Ordinance shall be read as if the words ' giving false evidence ' " were therein used instead of the word ' perjury.' *Explanation* 1. " —A statement is within the meaning of this section whether it " is made verbally or otherwise. *Explanation* 2.—A false statement as to the belief of the person attesting is within the " meaning of this section, and a person may be guilty of giving " false evidence by stating that he believes a thing which he does " not believe, as well as by stating that he knows a thing which " he does not know. Illustrations .... "

In Supreme Court Case No. 10, before the same commissioner, the appellant had been indicted with one Yothan Singho, the latter with attempting to murder one Peiris Singho and the appellant with aiding and abetting. In the non-summary proceedings before the magistrate, one Gunatilleke had given evidence that he was employed by the appellant and that the appellant had given him and Yothan Singho arrack and a club and had directed them to go and kill Peiris Singho.

At the trial Gunatilleke, while continuing to say that he was in the appellant's employment, said that the rest of his evidence as summarized above was fabricated. He said that he had given his earlier evidence at the request of Peiris Singho's wife and that he had been promised Peiris Singho's daughter Kusumawathie in marriage if he gave that false evidence. He produced two documents which he said had been given him by Peiris Singho's wife containing the false evidence.

The case against the appellant had been based on Gunatilleke's evidence as given in the magistrates' court. There was no other evidence against him; the commissioner therefore directed the jury to acquit the appellant and that was done, the case proceeding against Yothan Singho, who ultimately pleaded guilty.

The commissioner directed the clerk of assize to prepare an indictment against Gunatilleke under section 439 of the Criminal Procedure Code, which read as follows: " 439. (1) If in the course " of a trial in any District Court or of a trial by jury before the " Supreme Court any witness shall on any material point con" tradict either expressly or by necessary implication the evidence " previously given by him at the inquiry before the Magistrate, it " shall be lawful for the presiding judge, upon the conclusion of " such trial, to have such witness arraigned and tried on an " indictment for intentionally giving false evidence in a stage of " a judicial proceeding. In a trial before the Supreme Court the " indictment shall be prepared and signed by the registrar, and " the accused may be tried by the same jury. In a trial in a " District Court the indictment shall be prepared and signed by " the secretary of such court. (2) At such trial it shall be " sufficient to prove that the accused made the contradictory " statements alleged in the indictment, and it shall not be " necessary to prove which of such statements is false. (3) The " presiding judge may, if he considers expedient, adjourn the trial " of such witness for such period as he may think fit, and may " commit such witness to custody or take bail in his own recog" nizance or with sureties for his appearance. In the Supreme " Court such adjourned trial shall be before the same or any other " jury as the judge shall direct."

Gunatilleke pleaded guilty. The commissioner wanted to hear evidence with regard to what he called " the background " with a view to deciding on the appropriate sentence. If the statement made to the magistrate was fabricated Gunatilleke had sworn false evidence incriminating an innocent man to further a love affair. If that evidence was true his evidence at the trial might have been due to a desire to shield the appellant, whom everyone had described as his master, as a result of or in hope of some payment. The commissioner might have left Gunatilleke to give or call evidence in mitigation if he so desired. His counsel made various statements on instructions to the effect that his evidence just given at the trial was the truth. The commissioner decided himself to have witnesses called and ordered that Peiris Singho, Punchi Nona his wife, Kusumawathie his daughter, and the appellant should be called. The wife and daughter both denied that they had written the documents produced by Gunatilleke or that there was any truth in his story of his possible marriage with the daughter. The daughter said that Gunatilleke was employed by the appellant.

The appellant then gave evidence, being examined by Crown counsel, and in the course of his examination he was asked a number of questions by the commissioner. The commissioner came to the conclusion that he was deliberately lying, in particular in saying that Gunatilleke had never been his servant, that he did not know him, though he had once seen him in the bazaar, and that he did not know his name until he gave evidence against him. It was in respect of that evidence that the sentence appealed from was imposed.

1958. April 22, 23. *Dingle Foot Q.C.*, *Joseph Dean* and *Miss D. Phillips* for the appellant. On the face of it section 440 (1) of the Criminal Procedure Code does appear to give the court an unlimited discretion, but the proper limits within which that discretion should be exercised have been the subject of judicial consideration on a number of occasions. The effect of the recent decision in *Subramaniam* v. *The Queen* [1] is, it is submitted, that section 440 (1) should only be applied where it is plain beyond any doubt that the witness has given false evidence within the meaning of section 188 of the Penal Code. The discretion should not be exercised where there is any conflict of evidence between different witnesses or where there is any room for any further inquiry. *Subramaniam's* case [1] clearly lays down the limitations within which this discretion should be exercised, and the judgment in that case quite clearly applies in the present case—what has been done here is precisely what the Board there said should not be done. The fact that here the commissioner considered the appellant's case simultaneously with Gunatilleke's case, whereas in *Subramaniam's* case [1] the cases were considered separately, in substance really makes no difference. Here the commissioner went beyond his function and there was something like a full scale investigation in order to establish his view that the appellant had given false evidence. The conflict of evidence was whether Gunatilleke had been employed by the appellant or not. Even assuming that the commissioner was entitled to hold such an investigation as this, at least the charge against the appellant should have been clearly formulated and he should have been given an opportunity of meeting it. If he was going to act at all, the commissioner could and should have acted under subsection (4) of section 440 and then there could have been no possible complaint. He never considered subsection (4).

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[1] [1956] 1 W.L.R. 456.

The matter is one of discretion—it is not sought to say that the commissioner had no jurisdiction—and in contempt cases the Board has said that the discretion is not unlimited, and if it is improperly exercised, and in a way which is inconsistent with natural justice, the Board will always intervene. On three occasions the commissioner said—and nobody else had said so—that Gunatilleke had changed his story because he had been bribed by the appellant to do so. It was said in *Ibrahim* v. *The King* [2] that for the Board to intervene there must be something which, in the particular case, " deprives the accused of the " substance of fair trial and the protection of the law, or which, " in general, tends to divert the due and orderly administration " of the law into a new course, which may be drawn into an evil " precedent in future." It is sought to bring this case within the two heads " deprives the accused of a fair trial " and " divert " the administration of justice into a new course."

With regard to the authorities, in *In re Pollard*,[3] a contempt case, it was held that a contempt of court being a criminal offence, no person could be punished for it unless the specific offence charged against him had been distinctly stated and an opportunity given to answer it. There is, it is submitted, a very close analogy between criminal contempt summarily punishable by the court and the matter now before the Board; and section 440 (1) says " as for a contempt of the court." In *Chang Hang Kiu* v. *Piggott* [4]—a case under a precisely similar section in Hong Kong—it was said that as the Ordinance there in question did not dispense with giving the appellants an opportunity before sentence of explaining or correcting misapprehensions of their statements, it was essential that it should be accorded to them.

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[2] [1914] A.C. 599, 615; 30 T.L.R. 383.

[3] (1868) L.R. 2 P.C. 106.

[4] [1909] A.C. 312; 25 T.L.R. 381.

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Those two decisions of the Board are material to the consideration of the present case. There are, in addition, cases in Ceylon which draw a very clear distinction between cases where it is proper to invoke this section and cases where a different procedure should be followed. All of them point to the conclusion arrived at in *Subramaniam's* case [5]—that this section should be used only where it is quite plain that perjury has been committed, and not in a case where there is a conflict of evidence: *Sivakolunthu* v. *Chelliah* [6]; *Rex* v. *Amadoru* [7]—the whole judgment in that case is in the appellant's favour; *Ahamath* v. *Silva* [8]; *In re Seeman*,[9] in which it was perfectly clear that in the course of the proceedings the witness had perjured himself, and in such a case the section of course operates.

The test must go deeper than in a criminal case—beyond reasonable doubt—here there has to be virtual certainty. There is a current of authority in Ceylon showing that it is not appropriate to apply this particular section where there is, as here, a conflict of evidence: *Lindula* v. *Silva* [10]; *Dassanayake* v. *Excise Inspector, Horana.*[11] There is a similar section in the Gold Coast —section 139 of the Criminal Procedure Code—and in *In re Samuel Nunoo* [12] the defendant was specifically called on to show cause, and it was said that he must be made aware of the gist of the charge against him. In the present case nothing whatever specific was put to the appellant as to what was false; at no stage was he given a chance to show cause; that is not a proper exercise of the judicial discretion given by the section and is plainly a denial of natural justice. This conviction ought not to stand.

T. O. Kellock for the Crown. The terms of section 440 (1) are quite clear; there is no suggestion that there should be any form of trial, or any suggestion of an opportunity of cross-examining witnesses or anything else. The section is designed to avoid the formalities of a trial. There are authorities, other than those which have been referred to, where the test is that if the judge at the trial has satisfied himself by reasonable evidence that perjury has been committed, then the appeal court will not intervene: *Andris* v. *Juanis.*[13] That is the first authority in Ceylon which deals with this matter and it does support what is common ground—that the accused must be given the facts and an opportunity to be heard; but that is all that that authority states. On the plain meaning of the section the exercise of this power should not be fettered by certain rules as to evidence. It is conceded that on the authority of *Chang Hang Kiu* v. *Piggott* [14] the witness should be informed of the gist of the accusation and be given an opportunity to answer it. Both those factors are present here—the appellant did know what the charge was, he was summarily told and was asked to show cause, and he did not.

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[5] [1956] 1 W.L.R. 456.
[6] (1910) 13 N.L.R. 289.
[7] (1911) 14 N.L.R. 481.
[8] (1920) 22 N.L.R. 444.
[9] (1945) 46 N.L.R. 142.
[10] (1927) 9 C.L.Recdr. 42.
[11] (1946) 47 N.L.R. 47.
[12] (1936) 3 W.A.C.A. 74.
[13] (1896) 2 N.L.R. 74.

In each of the Ceylon cases referred to for the appellant there was a direct conflict between two witnesses, and the only rule to be deduced from them is that in a case where two witnesses contradict each other it would not be proper to act under this section. In *Chang Hang Kiu's* case [14] the judge must have acted on conflicting evidence of that sort. The view of Wood Renton J. in *Rex* v. *Amadoru* [15] is adopted; he specifically deals there with the balance of conflicting evidence. Reliance is also placed on *Banda* v. *Sada*,[16] where it was said: " The legislature has left " the courts quite free as a matter of law to deal under that " section [440 (1)] with any form of ' false evidence ' within the " meaning of section 188 of the Penal Code, and if we attempt " to fetter that discretion by rigid general rules as to the class " of cases in which it may or may not be exercised, we shall be " acting rather in a legislative than in a judicial capacity, and " running the risk of paralysing the operation of a statutory " power, the maintenance of which in full working order is essen- " tial to the administration of justice in this country . . . and we " have every right to consider ourselves . . . [entitled] to inquire " whether this statutory power can be safely exercised in any " particular case that has come before us." [*In re Seeman* [17] was also referred to.] Those authorities show that this discretion cannot be fettered. The investigation in *Subramaniam's* case [18] was entirely different from that in the present case, where there was a perfectly proper exercise of the judge's powers. In *Subramaniam's* case [18] there was a long investigation during the course of the trial.

The commissioner clearly had in mind the difference between bribery and perjury, and was directing his mind to perjury only. The discretion, if it was a discretion, should not be interfered with. The appellant is on bail.

Dingle Foot Q.C. in reply. This is an exceptional power in that the persons concerned are deprived of all the protection which the law normally provides. The section should only be used in the plainest cases, and if there is any element of doubt recourse should be had to the normal process of the law provided for in subsection (4). *Andris* v. *Juanis*,[19] cited for the Crown, is in fact entirely in the appellant's favour. Judged by the test in *Chang Hang Kiu's* case [20]—that there must be an opportunity of giving reasons against summary measures being taken—this procedure is open to the most serious criticism. It must be contrary to natural justice that never at any stage was the appellant given an opportunity of dealing with the matter—there was just the general allegation of a string of falsehoods.

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[14] [1909] A.C. 312.
[15] 14 N.L.R. 481, 483.
[16] (1914) 17 N.L.R. 510, 512.
[17] 46 N.L.R. 142.
[18] [1956] 1 W.L.R. 456.

April 23. VISCOUNT SIMONDS announced that their Lordships would humbly advise Her Majesty that the appeal should be dismissed and that they would give their reasons later.

June 3. The reasons of their Lordships for dismissing the appeal were delivered by LORD SOMERVELL OF HARROW, who stated the facts and statutory provisions set out above and continued: In *Chang Hang Kiu* v. *Piggott* [1] this Board considered an Ordinance of Hong Kong in similar terms to section 440 (1) of the Ceylon Criminal Procedure Code. It was laid down that before an order was made under such a provision the gist of the accusation must be made clear to the witness and he must be given an opportunity of giving reasons against summary measures being taken. The witnesses in that case had not been given such an opportunity and the appeal was allowed. This decision assimilated the procedure to that laid down by the Board for ordinary contempt of court in *In re Pollard*.[2]

It was submitted for the appellant that neither of the above conditions was satisfied. The only basis for this submission was that the nature of the charge which had already been indicated in general terms was particularized with regard to one specific point after the appellant had been clearly given an opportunity to give reasons against summary measures being taken. In their Lordships' opinion this point fails.

It was further submitted that the commissioner had done that which was held to be wrong in *Subramaniam* v. *The Queen*.[3] The appellant in that case was a witness in a murder trial. The trial judge came to the conclusion as the evidence was called that there had been a conspiracy between the accused man, the appellant and the police to suppress evidence. He came to the conclusion that the evidence as given did not justify leaving the case to the jury, whom he directed to bring in a verdict of not guilty. This was on March 15. Later on that day, and on March 16 and 18, the judge called the appellant and others whom he suspected. The appellant and others were represented by counsel. Medical evidence was called on behalf of one of those suspected. The appellant was sentenced on March 18. There were other unsatisfactory features as appear from the Record, but it was in these circumstances that Lord Oaksey, in delivering the judgment of the Board, used these words [4]: " In their Lordships' opinion the " course taken by the commissioner was misconceived. The sum- " mary power conferred by section 440 (1) is one which should " only be used when it is clear beyond doubt that a witness in the " course of his evidence in the case being tried has committed " perjury. It was, in their Lordships' opinion, never intended " that, in the exercise of the power under section 440 (1) in the " course of a criminal trial a subsidiary criminal investigation " should be set on foot not against the prisoner charged but " against the witnesses in the case. If such an investigation is " necessary it can and should be set on foot under section 440 (4)." Nothing of the kind took place in the present appeal. The evidence was given in the course of the trial, in relation to sentence. This point also fails.

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[19] 2 N.L.R. 74.

[20] [1909] A.C. 312.

[1] [1909] A.C. 312; 25 T.L.R. 381.

[2] (1868) L.R. 2 P.C. 106.

[3] [1956] 1 W.L.R. 456.

The appellant further submitted that the commissioner's discretion had not been judicially exercised and that the case was not a proper one for section 440. Their Lordships have carefully considered the points made subsidiary to the points already considered and are satisfied that there is no substance in them. The commissioner regarded the matter as clear beyond doubt. He saw and heard the witness and there was clearly material on which he could be so satisfied.

Their Lordships were referred to a number of cases in Ceylon in which this section has been considered. In some cases it is said it should not be used where there is a conflict of testimony: see Bonser C.J. in *Andris* v. *Juanis*,[5] *Ahamath* v. *Silva* [6] and *Dassanayake* v. *Excise Inspector*, *Horana*.[7]

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[4] [1956] 1 W.L.R. 456, 460.

[5] (1896) 2 N.L.R. 74.

[6] (1920) 22 N.L.R. 444.

[7] (1946) 47 N.L.R. 47.

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From its nature the power is one which should only be used when the judge is " clear beyond doubt "—to take the words used by Lord Oaksey in *Subramaniam's* case [8]—that the witness has given false evidence as defined. Subject to that overriding principle their Lordships adopt what was said by Wood Renton C.J. in *Banda* v. *Sada* [9]: " The true interpretation of the scope of " section 440 of the Criminal Procedure Code appears to be this. " The legislature has left the courts quite free as a matter of law " to deal under that section with any form of ' false evidence ' " within the meaning of section 188 of the Penal Code, and if we " attempt to fetter that discretion by rigid general rules as to the " class of cases in which it may or may not be exercised, we shall " be acting rather in a legislative than in a judicial capacity, and " running the risk of paralysing the operation of a statutory power, " the maintenance of which in full working order is essential to " the administration of justice in this country. But there is " ancient and sound authority for the proposition that ' all things " ' that are lawful are not expedient,' and we have every right to " consider ourselves, in the exercise of our original jurisdiction, " and in the exercise of our appellate jurisdiction [entitled] to " inquire whether this statutory power can be safely exercised in " any particular case that has come before us."

Their Lordships regret that the respondent, who successfully opposed the appeal, was not represented for the assistance of the Board when the petition for leave to appeal was heard.

For the reasons which have been stated their Lordships have humbly advised Her Majesty that this appeal be dismissed.

Solicitors: *Graham Page & Co.; T. L. Wilson & Co.*

C. C.

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[8] [1956] 1 W.L.R. 456, 460.

[9] (1914) 17 N.L.R. 510, 512.

CLIFFORD JOHN CHICK AND ANOTHER . . APPELLANTS;

AND

COMMISSIONER OF STAMP DUTIES . . RESPONDENT.

J. C.*

1958
June 17.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Australia (New South Wales)—Revenue—Death duty—Gift—Exclusion of donor—Gift of grazing property—Subsequent use of property by donor and donee under partnership agreement—Not "retained" by donee to the "entire exclusion" of donor—Dutiable estate of donor—Stamp Duties Act, 1920–56 (*N.S.W.*), *s.* 102 (2) (*d*).

By section 102 of the New South Wales Stamp Duties Act, 1920–56: "For the purposes of the assessment and payment of "death duty . . . the estate of a deceased person shall be deemed "to include and consist of the following classes of property:— ". . . (2) (*d*) Any property comprised in any gift made by the "deceased at any time . . . of which bona fide possession and "enjoyment has not been assumed by the donee immediately upon "the gift and thenceforth retained to the entire exclusion of the "deceased . . ."

In 1934 a father transferred by way of gift to one of his sons a pastoral property, the gift being made without reservation or qualification or condition. In 1935, some 17 months after the gift, the father, the donee son and another son entered into an agreement to carry on in partnership the business of graziers and stock dealers. The agreement provided, inter alia, that the father should be the manager of the business and that his decision should be final and conclusive in connexion with all matters relating to its conduct; that the capital of the business should consist of the livestock and plant then owned by the respective partners; that the business should be conducted on the respective holdings of the partners and such holdings should be used for the purposes of the partnership only; that all lands held by any of the partners at the date of the agreement should remain the sole property of such partner and should not on any consideration be taken into account as or deemed to be an asset of the partnership, and any such partner should have the sole and free right to deal with it as he might think fit.

Each of the three partners owned a property, that of the donee son being that which had been given to him by his father in 1934, and each partner brought into the partnership livestock and plant, and their three properties were thenceforth used for the depasturing of the partnership stock. That continued up to the death of the father in 1952:—

Held, that the value of the property given to the son in 1934 was to be included in computing the value of the father's estate for the purposes of death duty. While it was not disputed that the son had assumed bona fide possession and enjoyment of the property immediately upon the gift to the entire exclusion of the father, he had not, on the facts, thenceforth retained it to the father's entire exclusion, for under the partnership agreement, and whatever force and effect might be given to that part of it which gave a partner the sole and free right to deal with his own property, the partners and each of them were in possession and enjoyment of the property so long as the partnership subsisted.

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* *Present*: VISCOUNT SIMONDS, LORD TUCKER, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW and LORD DENNING.

Where the question is whether the donor has been entirely excluded from the subject-matter of the gift, that is the single fact to be determined, and, if he has not been so excluded, the eye need look no further to see whether his non-exclusion has been advantageous or otherwise to the donee.

Oakes v. *Commissioner of Stamp Duties of New South Wales* [1954] A.C. 57; [1953] 2 All E.R. 1563 considered.

Commissioner of Stamp Duties (*N.S.W.*) v. *Owens* (1953) 88 C.L.R. 67 approved.

It was irrelevant that the father gave (if he did give) full consideration for his right as a member of the partnership to possession and enjoyment of the property that he had given to his son.

Dictum of Isaacs J. in *Lang* v. *Webb* (1912) 13 C.L.R. 503 at 517 approved.

Judgment of the Supreme Court of New South Wales affirmed.

Appeal (No. 6 of 1958) from a judgment of the Supreme Court of New South Wales (June 28, 1957) on a case stated by the respondent, the Commissioner of Stamp Duties of New South Wales, under section 124 of the New South Wales Stamp Duties Act, 1920–56.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: The question raised by this appeal was whether certain pastoral property near Gurley known as "Mia Mia," which on April 21, 1952, the date of the death of John Chick (hereinafter called "the deceased"), belonged to his son, Clifford John Chick, should be included in the dutiable estate of the deceased. The respondent claimed that it should be included and the Supreme Court (Street C.J., Roper C.J. in Eq., and Walsh J.) upheld his claim. Against that decision the appellants, the executors of the deceased, appealed.

The respondent rested his claim upon section 102 (2) (*d*) of the Stamp Duties Act which, at the relevant date, was in the following terms:—" Section 102.—For the purposes of the assessment " and payment of death duty but subject as hereinafter provided, " the estate of a deceased person shall be deemed to include and " consist of the following classes of property:— . . . (2) (*d*) Any

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"property comprised in any gift made by the deceased at any "time, whether before or after the passing of this Act, of which "bona fide possession and enjoyment has not been assumed by "the donee immediately upon the gift and thenceforth retained "to the entire exclusion of the deceased, or of any benefit to him "of whatsoever kind or in any way whatsoever whether enforce-"able at law or in equity or not and whenever the deceased died."

The material facts can be briefly stated. On February 19, 1934, the deceased transferred by way of gift to his son, the appellant Clifford John Chick, the property "Mia Mia" together with the improvements thereon. That gift was made without reservation or qualification or condition. The donee was then living in a homestead erected on the property and continued to do so until the death of the deceased in 1952.

On July 25, 1935, some 17 months after the gift, the deceased and the said Clifford John Chick and another son, the appellant Jack Wesley Chick, entered into an agreement to carry on in partnership the business of graziers and stock dealers under the name or style of John Chick & Sons. The agreement provided (by clause 1) that the partnership should commence or be deemed to have commenced on July 1, 1935, and, subject to the conditions thereof, should continue until dissolved in manner thereinafter appearing; (by clause 2) that the deceased should be the manager of the said business and that his decision should be final and conclusive in connexion with all matters relating to its conduct; (by clause 4) that the capital of the business should consist of the livestock and plant then owned by the respective partners or thenceforth to be acquired in connexion with the business; (by clause 5) that the said business should be conducted on the respective holdings of the partners at or near Gurley and such holdings should be used for the purposes of the partnership only; (by clause 12) that the partnership might be terminated as therein mentioned and (by clause 13) that any and all lands held by any of the partners at the date of the agreement or acquired afterwards should be and remain the sole property of such partner and should not on any consideration be taken into account as or deemed to be an asset of the partnership and any such partner holding any such land should have and retain the sole and free right to deal with the same as he might think fit.

In pursuance of that agreement each of the partners brought into the partnership livestock and plant previously owned by him. Each of them also at the date of the agreement owned a property near Gurley (the property of Clifford John Chick being "Mia

"Mia") and their three properties were thenceforth used for the depasturing of the partnership stock. That continued up to the death of the deceased. In computing the final balance of his estate for the purposes of the Act the respondent included the value of "Mia Mia," thus bringing up the total amount of duty chargeable from £13,590 to £27,100 11s. 6d. He contended that the facts which have been stated precluded the appellants from claiming that the bona fide possession and enjoyment of the property, though it might have been assumed by the donee immediately upon the gift, was thenceforth, that is, at all times until the death of the deceased, retained by him to the entire exclusion of the deceased or any such benefit to him as was mentioned in the subsection. The Supreme Court upheld that contention.

The executors appealed.

1958. May 13, 14, 15. *Sir Garfield Barwick Q.C.* and *Robert Ellicott* (both of Australia) for the appellants. There is no question here that the donee immediately upon the gift assumed bona fide possession and enjoyment of the property to the entire exclusion of the deceased, and that the subject-matter of the gift was the fee simple; the question is whether the donee failed to retain the beneficial possession to the exclusion of any benefit to the deceased—whether entering into the partnership cut down the beneficial possession of the donee. The benefit that is relevant under this section is one which cuts down the bona fide possession and enjoyment of which the section speaks. The benefit has to be out of the bona fide possession and enjoyment. Other expressions are such as it must "trench upon it," "compromise "it," "impair it." The critical word is "exclude"—has the deceased been excluded from the benefit assumed? The answer here is clearly "Yes." There is not here the question—which has been frequently litigated—whether or not the thing given excludes some interest; a question of the identity of what was given. Nor is the question whether the deceased is being put back into possession of the thing that was given; that was *Commissioner of Stamp Duties of New South Wales* v. *Permanent Trustee Co. of New South Wales* (*Davies'* case [1]) and *O'Connor* v. *Commissioner of Succession Duties* (*S.A.*).[2] This case is different in a radical respect from any of the cases except *Commissioner of Stamp Duties* (*N.S.W.*) v. *Owens*,[3] because here there has been a clear assumption of the possession and enjoyment and the problem is whether the deceased subsequently obtains some benefit. Is this benefit which he gets something which is carved out of the beneficial ownership or possession of the fee simple? The Crown say that it is.

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[1] [1956] A.C. 512; [1956] 2 All E.R. 512.

[2] (1932) 47 C.L.R. 601.

[3] (1953) 88 C.L.R. 67.

The dominant word in this section is "exclusion" from the thing assumed; and when one gets down to the word "benefit" it has to be a benefit within the area from which he must be excluded—it has to be a benefit out of the thing that was given. These grazing partnerships are a common form of partnership where there is no interest in the land on which the stock is running. All that the deceased had was a contractual right, not specifically enforceable, in the partnership; that, according to the judges in *Owens'* case,[3] would warrant the conclusion that there was no interest in the land. If there was no interest in the land the donee's beneficial possession of the land was unimpaired—the contract was immaterial. Even assuming that the partnership agreement created an interest in the land, did the donee, by entering into the partnership, admit the deceased to any part of his beneficial possession of the property as the owner in fee simple—that being the thing which the donee had assumed? The answer is "No." This point arises as a clear-cut issue in this case. The right conclusion, however, is that the partnership agreement created no interest in the land at all. That results from reading clauses 5 and 13 together. Further, the partnership agreement was an independent commercial transaction for full consideration later than, and in no way related to, the gift, and was a mode of enjoyment by the donee of his property and an exercise by him of the possession of it.

Down to the word "benefit" in the section there is no difference between section 102 (2) (*d*) and the comparative English legislation. With regard to the authorities, it was said in *St. Aubyn* v. *Attorney-General*[4] that "the words, and particularly "the word 'exclusion,' are singularly inapt to cover a benefit "which does not arise by way of reservation out of that which "is given." In *Oakes* v. *Commissioner of Stamp Duties of New South Wales*[5] the significant thing is that the remuneration was taken out of the children's money—out of the thing given; the father was taking from the children that which he had given. Where a donee grants to the donor a lease of the property given, the donee is still in beneficial possession; the tenant has not eaten into his rights in any significant sense; the donee has not got to keep the property in his exclusive physical possession; he is in exclusive possession while he is getting the rents. *Lord Advocate* v. *Stewart* [6] has an element in it which it is desired to put. It would be contrary to the decision in *Commissioner of Stamp Duties* (*N.S.W.*) v. *Thomson* [7] to decide the present case against the appellants. It was said in *Attorney-General* v. *Seccombe* [8]: "The principle there [in *Lord Advocate* v. *Stewart* [9]] laid down, "as I understand it, is that the possession and enjoyment or "benefit from which the Act contemplates that the cedent or "donor must be entirely excluded must be derived from some "enforceable right . . . and therefore not merely a benefit which "is derived from his being present for a greater or less time in "the old house by leave and licence of the donee." In *Munro* v. *Commissioner of Stamp Duties* [10] the Board said: "Further, "the benefit which the donor had as a member of the partnership "in the right to which the gift was subject was not in their "Lordships' opinion a benefit referable in any way to the gift. "It was referable to the agreement of 1900 and nothing else, "and was not therefore such a benefit as is contemplated by "section 102 (2) (*d*)." The benefit (if any) which the deceased obtained in the present case in respect of the property was not referable to the gift but to the partnership agreement, nor was it a qualification of the gift. *Munro's* case [10] was distinguished in *Owens'* case.[11] The appellants here have no interest to challenge the distinction. *Owens'* case,[11] it is submitted, was wrongly decided. But it was said in that case that the partnership arrangement created no right or interest in the land. If that is so, the Supreme Court in the present case ought to have said that there was no cutting down—the donee had a right to it all. Bona fide possession of the property "Mia Mia" was at all material times retained by the donee to the exclusion of the deceased or of any benefit to him of whatsoever kind or in any way whatsoever.

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[4] [1952] A.C. 15, 25; [1951] 2 All E.R. 473.

[5] [1954] A.C. 57; [1953] 2 All E.R. 1563.

Gordon Wallace Q.C. (of Australia) and *Anthony Cripps Q.C.* for the respondent. Where the gift itself is a gift of a tenancy in common the nature of the gift is such that it carries with it the right mutually to enjoy the whole of the property, and that

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[6] (1906) 8 F. 579, 595.
[7] (1927) 40 C.L.R. 394.
[8] [1911] 2 K.B. 688, 700.
[9] 8 F. 579.
[10] [1934] A.C. 61, 67.
[11] 88 C.L.R. 67.

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is why the Board in *Oakes'* case [12] held that there was no benefit which impinged on the donee's interest. But where the gift is of the fee simple, and thereafter a partial enjoyment of the given property takes place, an entirely different situation is created. That is the short distinction which it is sought to draw between *Oakes'* case [12] and a case like the present, and it is an important distinction. The case of a lease is quite different from cases of tenancies in common; in the latter each is entitled to occupy the whole.

The section looks now not to the question of legal right but to the factual position. There are four inquiries: (1) What was the property given? (2) Has the donee immediately assumed bona fide possession and enjoyment of the given property according to its nature? There is no difficulty in the present case about those two matters. (3) Has the donee henceforth retained such possession and enjoyment to the entire exclusion of the deceased from such possession and enjoyment? (4) Has the donee henceforth retained such possession and enjoyment to the entire exclusion of any benefit to the deceased of whatsoever kind? For the appellants to succeed, the last two questions must each be answered in the affirmative. Under the first limb of the section, i.e., entire exclusion from possession and enjoyment, it cannot matter whether it is for consideration or otherwise. The deceased is the one person in the world with whom the donee may not have any association whatever. Reliance is placed on the history of the section. The Act is intended to prevent a case where, e.g., a donor of land to his son takes a lease of it and grazes sheep on it for some years, he has had possession and enjoyment of it, and on his death, if the appellants are right, would escape duty. There may be more room under the second limb of the section—benefit—for the view that consideration is a factor, but it is submitted that it is not. It is desirable to segregate the two limbs.

Owens' case [13] seems by Dixon C.J. and Kitto J. to be a possession and enjoyment case and also a benefit case. A grammatical construction of the words of the English section was given in *Attorney-General* v. *Seccombe*.[14] The donor must be entirely excluded from possession and enjoyment; it is only when one comes to the second limb—the benefit limb—that the question of impairment arises. The impairment doctrine, it would seem, has always been associated with the benefit limb. The present case comes under both limbs. It is a benefit because the partnership was run for the purpose of obtaining profit and the deceased was a member of the partnership. It impairs because the donee otherwise could use the property entirely for himself and run it exclusively for his own sheep.

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[12] [1954] A.C. 57.
[13] 88 C.L.R. 67.
[14] [1911] 2 K.B. 688, 699.

There are at least two cases illustrative of the proposition that there can be a hiatus in point of time between the gift and the subsequent transaction: *Davies'* case,[15] where for many years the donee was in full possession and enjoyment. The result of that case gives the present respondent great support. The other case is *O'Connor's* case,[16] in which it was held that the beneficial interest and possession of the given property was not retained to the entire exclusion of the donor. The kernel of the matter is that partnership as such or no partnership agreement, in fact the deceased is found receiving a beneficial interest, and he is found in possession and enjoyment. When dealing with the first limb only, so long as the donor is found in exclusive or partial or sole or joint possession or enjoyment of the given property, that is the question, and no question of impairment or consideration arises. It does not matter that in the strict legal sense the donee may be regarded as owner or in legal possession; what the section forbids is the donor having possession and enjoyment in the sense that he would in actual fact enjoy and possess it. The donee may have the right to terminate such possession and enjoyment at a moment's notice, but what the section looks to is the factual position.

The proper way of construing clauses 5 and 13 of the partnership agreement is to read the agreement as a whole and to give effect to both clauses, if that can be done, in order to give business efficacy to the document; in any event clause 13 has to be read subject to clause 5.

Owens' case [17] supports the submissions for the respondent here. If the joint judgment of Dixon C.J. and Kitto J. in that case be correct, then the present case is an a fortiori one, because here there is a partnership agreement in writing in which it was a term and condition that the given property should be used exclusively for grazing purposes. *Owens'* case [17] was rightly decided; in it (a) there was applicability of *Munro's* case [18]; (b) all the judges either expressly or impliedly considered that a use of the given land by a partnership of which the donor was a member would attract the section; and (c) the Chief Justice and Kitto J. correctly analysed the words "referable to the gift" in *Munro's* case.[18] *Owens'* case[19] should not be overruled. *Davies'* case[20] is a true example of an independent subsequent transaction; secondly, it is a case very like the present; thirdly, most, if not all, of the present arguments submitted for the appellants were submitted in that case and failed.

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[15] [1956] A.C. 512.

[16] 47 C.L.R. 601.

[17] 88 C.L.R. 67.

[18] [1934] A.C. 61, 67.

To summarize the submissions on the point that an independent and subsequent transaction may attract the section, reliance is placed on the fact that nothing in the section says otherwise, and on the following cases: *O'Connor's* case,[21] *Davies'* case,[22] *Seccombe's* case[23] and *Rudd* v. *Commissioner of Stamp Duties*.[24]

The contention for the appellants that the partnership agreement was an independent commercial transaction for full consideration in no way related to the gift, and an exercise by the donee of his possession of the property, is devoid of authority in the appellants' favour; it is a novel argument, and it is contrary to the wording of the section and contrary to the reported cases; every case is against it either expressly or by implication. There is no difference in the argument on the first limb—possession and enjoyment—whether it was for a peppercorn or for full consideration. On the consideration point reliance is also placed on *Oakes'* case[25]; see also *Lang* v. *Webb*[26] and *In re Nichol, decd., Johnstone* v. *Commissioner of Stamp Duties* (No. 2).[27]

The general submission about *Thomson's* case[28] is that it would be almost unthinkable that it should be taken as authority for doing what the appellants want the Board to do—it is a decision where the judgments are conflicting; they give different reasons; and it is given on a section which differs materially from the present one. The *St. Aubyn* case[29] was concerned with two things: (1) defining the subject-matter of the gift, and (2) having done that, then saying whether the benefit, if any, came out of the gift. The donee must not only enjoy possession but entirely exclude the donor from association. *In re Nichol, decd.*[30] was a case of a partnership created after the gift, and it was said that there was clearly a benefit to the testator because he took a share in the profits of the business. The presence of either limb is sufficient to bring about the inclusion in the deceased's estate of the subject-matter of the gift: *Commissioner of Stamp Duties* v. *Shrimpton.*[31]

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[18] [1934] A.C. 61, 67.
[19] 88 C.L.R. 67.
[20] [1956] A.C. 512.
[21] 47 C.L.R. 601.
[22] [1956] A.C. 512.
[23] [1911] 2 K.B. 688.
[24] (1937) 37 S.R.(N.S.W.) 366.
[25] [1954] A.C. 57.
[26] 13 C.L.R. 503.
[27] [1931] N.Z.L.R. 718.
[28] 40 C.L.R. 394.
[29] [1952] A.C. 15, 26, 27.
[30] [1931] N.Z.L.R. 718.

It is therefore a wrong approach to say that all that the deceased gets is mere occupation and that the enjoyment and possession of the donee remain unaffected. There is no room for that conception in the section. In short, (1) the section permits the donee to retain possession and enjoyment to the exclusion of possession and enjoyment of, or benefit to, anyone, including the donor. (2) He may relinquish possession and enjoyment, but not to the donor. (3) He may retain possession and enjoyment, but may confer benefit, but not on the donor. (4) The fact that the transaction in question may be considered to be an ordinary commercial transaction does not affect the matter at all. (5) There appears to be no room whatever for the impairment doctrine in the New South Wales statute; it is "in any way "whatsoever whether enforceable or not." Both limbs of the section are attracted by the conduct of the deceased and donee in this case. *Owens'* case [32] was correctly decided.

Anthony Cripps Q.C. following. The essence of the present case is really the same as the essence of the *Davies* case.[33]

Sir Garfield Barwick Q.C. in reply. It has become of singular importance that this section should be laid to rest as soon as possible. The mischief aimed at by this type of legislation is to prevent colourable gifts; but a construction must be put on it which makes it rational in that area. On the respondent's construction, if a father gave a house to his son, and later the son turned it into a hospital, and the father, having been taken ill, went into it as a paying patient, liability to duty would arise—although it may be the only hospital in the area. [Reference was made to *Davies'* case [33]; *O'Connor's* case [34]; *Oakes'* case [35]; *St. Aubyn's* case [36]; the two New Zealand cases of *In re Nichol, decd.*[37] and *Shrimpton* [38]; *Lang* v. *Webb*,[39] and *Owens'* case.[40]] In the present case no interest in the land was given to the deceased by the documents. There was no stipulation for the partnership at the time of the gift. There was no lease here;

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[31] [1941] N.Z.L.R. 761.
[32] 88 C.L.R. 67.
[33] [1956] A.C. 512, 525.
[34] 47 C.L.R. 601.
[35] [1954] A.C. 57.
[36] [1952] A.C. 15.
[37] [1931] N.Z.L.R. 718.
[38] [1941] N.Z.L.R. 761.
[39] 13 C.L.R. 503.
[40] 88 C.L.R. 67.

there was no tenancy of any sort. It is clearly a case in which the deceased was not admitted into the dominion.

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June 17. The judgment of their Lordships was delivered by Viscount Simonds, who stated the facts set out above and continued: It is not in dispute that the donee assumed bona fide possession and enjoyment of the property immediately upon the gift to the entire exclusion of the deceased or of any such benefit to him as is mentioned in the subsection. The question is whether he also thenceforth retained it and this depends on the impact of the subsection on the facts. Their Lordships have no doubt that the Supreme Court were right in upholding the contention of the respondent.

The respondent took his stand upon the plain words of the section. How, he asked, could it be said that the deceased was entirely excluded from the property, the subject of the gift, or from the possession and enjoyment thereof, when for some 17 years before his death he had been a member of a partnership, whose right it was to agist their stock upon it, and himself, moreover, was the manager of the partnership business with the power to make final and conclusive decisions upon all matters relating to it. The "objective and outward facts" (to use an expression of Isaacs J. in *Commissioner of Stamp Duties (N.S.W.)* v. *Thomson* [1]) were, he urged, wholly inconsistent with such exclusion. To this simple presentation of the case no adequate answer, as it appeared to their Lordships, was given by the appellants. Whatever force and effect might be given to clause 13 of the partnership agreement, upon which the appellants appeared to place some reliance, other parts of the agreement, and in particular clause 5, put it beyond doubt that the partners and each of them were in possession and enjoyment of the property so long as the partnership subsisted.

It is, however, right to refer to some of the contentions which were advanced on behalf of the appellants. In the first place, it is not disputed that the property was given outright by the deceased to his son. As was said by Dixon C.J. in *Commissioner of Stamp Duties* v. *Owens* [2]: "If ever there was a gift of an "estate in fee simple, carrying the fullest right known to the "law of exclusive possession and enjoyment, surely this was such "a gift." It follows that the decision of this Board in *Munro* v. *Commissioner of Stamp Duties*,[3] on which the appellants relied, has no application to the present case. It must often be a matter of fine distinction what is the subject-matter of a gift. If, as in *Munro's* case,[3] the gift is of a property shorn of certain of the rights which appertain to complete ownership, the donor cannot, merely because he remains in possession and enjoyment of those rights, be said within the meaning of the section not to be excluded from possession and enjoyment of that which he has given. This view of the section, which was reaffirmed in *St. Aubyn* v. *Attorney-General*[4] upon a consideration of a similar section in a British statute, need not be further elaborated. But the question may arise and, having arisen, may lead to a difference of opinion as to what is the subject-matter of the gift. It was, as it appears to their Lordships, for this reason that in *Owens'* case[5] Williams and Taylor JJ. dissented from the majority of the court. In the present case there is no room for any such difference.

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[1] (1927) 40 C.L.R. 394, 408.
[2] (1953) 88 C.L.R. 67, 88.
[3] [1934] A.C. 61.

Then it was contended that the subsection had no operation because the partnership agreement was an independent commercial transaction for full consideration later than and in no way related to the gift, and was a mode of enjoyment by the donee of his property and an exercise by him of the possession of it. (These are the words of the appellants' second formal reason.) In this reason there are several elements. The partnership agreement was " later " than the gift. This point was not pressed by counsel for the appellants. If possession and enjoyment are " thenceforth " to be retained by the donee, it is clearly irrelevant that there is an interval between the dates when the donor is excluded and ceases to be excluded. Nor is there wanting ample authority which shows that this is an irrelevant consideration. A recent example is *Commissioner of Stamp Duties of New South Wales* v. *Permanent Trustee Co. of New South Wales* (*Davies'* case).[6] Next, it was an " independent commercial " transaction for full consideration." It is to be assumed that it was an " independent " transaction: there was no evidence to the contrary. But the subsection says nothing about independent transactions. The sole question is one of fact—was the donor excluded? If he was not excluded, it is not relevant to ask why he was not excluded. Equally with regard to the transaction being " commercial " and " for full consideration." Their Lordships see no reason why a gloss should be put upon the plain words of the subsection by excluding from its operation such transactions. As long ago as 1912 in *Lang* v. *Webb* [7] (a case where a testatrix gave certain blocks of land to her sons and on the same day took leases from them of the same land) Isaacs J. said [8]: "The lease, however, gave to the donor possession and "enjoyment of the land itself, which is a simple negation of "exclusion, and brings the case within the statutory liability. "It was argued that as the rent was full value, the lessee's "possession and occupation were not a benefit. The argument is "unimportant because the lease, at whatsoever rent, prevents "the entire exclusion of the donor." This view of the subsection has never been departed from and their Lordships respectfully adopt the words of Isaacs J. in the present case. It is irrelevant that the donor gave (if he did give) full consideration for his right as a member of the partnership to possession and enjoyment of the land that he had given to his son.

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[3] [1934] A.C. 61.

[4] [1952] A.C. 15, 21; [1951] 2 All E.R. 473.

[5] 88 C.L.R. 67.

[6] [1956] A.C. 512; [1956] 2 All E.R. 512.

Then it is said that the transaction was "in no way related "to the gift and was a mode of enjoyment by the donee of his "property." The words "related to the gift" are no doubt an echo of the words "referable to the gift" which are to be found in *Munro's* case [9] and *St. Aubyn's* case,[10] and are lucidly explained by Dixon C.J. in *Owens'* case [11] and at an earlier date by Owen A.J. in *Rudd* v. *Commissioner of Stamp Duties*.[12] They might become of importance if it was the second limb of the subsection which was under consideration and the question, therefore, was whether the donor had been entirely excluded from any benefit of whatsoever kind. But it is difficult to see what bearing they have when the simple question is whether the donor has been excluded from the subject-matter of the gift, a pastoral property known as "Mia Mia," and the clear answer is that he has not. Finally, the words "was a mode of enjoyment by the "donee of his property" may be linked with the appellants' contention that the subsection was not applicable because (again to cite the formal reason) "neither the partnership agreement nor "the use of the property pursuant thereto impaired or detracted "from bona fide possession and enjoyment by the donee of the "property given." This contention, in their Lordships' opinion, involves a misconception, for which the subsection provides no justification. It may be that the donee can make no better use of the property given to him than, for instance, by leasing it back to the donor. The question still is whether as a fact the donor has been excluded. This appears to be the contention raised in another form that a commercial transaction is not within the subsection. The answer is that the possession and enjoyment by the donee of the property given to him in the manner most advantageous to himself are by no means incompatible with the donor not being excluded from it. It was, however, natural that the appellants should refer to and rely on the case of *Oakes* v. *Commissioner of Stamp Duties of New South Wales*.[13] In that case the testator, who owned a grazing property in New South Wales, executed a deed poll under which as from July 1, 1924, he held the property upon trust for himself and his four children as tenants in common in equal shares. The deed gave him wide powers of management and in particular provided that in addition to reimbursing himself all expenses of administration he was to be entitled to remuneration for all work done by him in managing the trust property on which he resided with his family in his capacity as trustee and manager in the same manner and as fully in all respects as if he were not a trustee thereof. He continued to manage the trust property until his death, receiving certain varying sums annually as remuneration, and after deducting these and other outgoings and expenses he divided the profits from the property into five equal shares, crediting one share to himself and one to each of his children. The children's shares he applied during their minority for their maintenance and education and paid them to the children when they came of age. The remuneration taken by the testator for managing the property was assumed to be appropriate and reasonable for any other manager.

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[7] (1912) 13 C.L.R. 503.
[8] Ibid. 517.
[9] [1934] A.C. 61.
[10] [1952] A.C. 15.
[11] 88 C.L.R. 67, 85.
[12] (1937) 37 S.R.(N.S.W.) 366, 392.

On these facts the commissioner claimed that the whole of the trust property should be included in the testator's estate for the purpose of duty. This claim was upheld by the High Court.[14] The decision of the High Court was affirmed by this Board in a judgment delivered by Lord Reid, in the course of which certain observations were made which, taken out of their context, appear to be favourable to the appellants. It had been argued on behalf of the commissioner that the testator derived a benefit within the meaning of the subsection from the fact that he had applied the trust income in the maintenance of his children and, if it had not been available, would have had to spend more of his own. This contention was rejected, Lord Reid saying[15]: " . . . their Lordships will assume that there was some advantage

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[13] [1954] A.C. 57; [1953] 2 All E.R. 1563.

[14] (1952) 85 C.L.R. 386.

[15] [1954] A.C. 57, 73.

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"to the deceased: but that advantage was not at the expense "of the children and did not impair or diminish the value of the "gift to them or their enjoyment of it. It is possible for a donee "in the full and unrestrained enjoyment of his gift to use or "spend it in a way that happens to produce some advantage to "the donor without there being any loss or disadvantage to the "donee. But, in their Lordships' judgment, any such advantage "is not a benefit within the meaning of the section. The point "is not strictly covered by authority, but the contrary view would "be difficult to reconcile with what was said in the House of "Lords in *St. Aubyn's* case.[16]" A passage to the same effect appears later in the judgment. Having disposed of this contention, the Board then dealt with the benefit derived by the testator from his management of the property and held that it was such a benefit as to bring the subsection into operation.

But it was the cited passage on which the appellants relied. Applying it to the facts of this case they said that the partnership agreement and all that was done under it by the deceased may have been beneficial to him, but the benefit or advantage derived by him did not impair or diminish the value of the gift of the property to the donee. On the contrary, it was the method most advantageous to the donee of dealing with the property. It was therefore not a benefit to the donor which brought the subsection into operation. Their Lordships cannot accept this view. It is in flat contradiction to the law cogently stated by Isaacs J. in *Lang* v. *Webb*[17] at an earlier stage in this opinion which has been consistently followed. Where the question is whether the donor has been entirely excluded from the subject-matter of the gift, that is the single fact to be determined. If he has not been so excluded, the eye need look no further to see whether his non-exclusion has been advantageous or otherwise to the donee. It must be observed that in *Oakes'* case[18] the Board appears to have been dealing with the second limb of the subsection, the question being whether the donor was entirely excluded from any benefit to him of whatsoever kind or in any way whatsoever. It is possible that in the consideration of this very difficult part of the subsection it may be pertinent in some cases to inquire whether the benefit derived by the donor is one that impairs or detracts from the donee's enjoyment of the gift. Their Lordships, with great respect, think that this is a matter which may require further examination, but, as they have already said, they are

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[16] [1952] A.C. 15.
[17] 13 C.L.R. 503, 517.
[18] [1954] A.C. 57.

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clearly of opinion that it is not a relevant consideration where the question arises under the first limb of the subsection and is whether the donor has been entirely excluded from the subject-matter of the gift, and they repeat that in the present case that question can only be answered in the negative.

Counsel for the appellants in the course of his argument conceded that he could only succeed if it was held that *Owens'* case,[19] to which reference has been already made, was wrongly decided. Their Lordships therefore think it right to say that they agree with the reasoning and conclusion of the majority of the High Court in that case.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the respondent's costs of this appeal.

Solicitors: *Waltons & Co.; Light & Fulton.*

C. C.

[19] 88 C.L.R. 67.

J. C.*
1958
July 7.

LAURI JOSEPH NEWTON AND OTHERS . . APPELLANTS;
AND
COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia — Revenue — Income tax — Avoidance — Private company — Special dividend—Share transactions—" Arrangement " resulting in increase of capital of company and capital payment to shareholders—Purpose and effect of avoiding liability for tax—" Absolutely void " as against commissioner—Penalty—" Arrangement "—" Purpose "—" Effect "—" Avoid "—Income Tax and Social Services Contribution Assessment Act, 1936–1951 (*Commonwealth*), *ss.* 226 (2), 260.

Revenue—Tax avoidance scheme.

By section 260 of the Commonwealth of Australia Income Tax and Social Services Contribution Assessment Act, 1936–1951: " Every contract, agreement, or arrangement . . . entered into, " orally or in writing, . . . shall so far as it has or purports to have

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* *Present*: VISCOUNT SIMONDS, LORD TUCKER, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW and LORD DENNING.

"the purpose or effect of . . . (c) . . . avoiding any . . . liability "imposed on any person by this Act . . . be absolutely void as "against the commissioner . . ."

The appellants were the holders of 80,000 ordinary £1 shares in a private company (the motor company) which in December, 1949—and before December 31—amended its articles of association so as to entitle the shareholders to a special dividend of £5 15s. 10d. on every £1 share. After payment of that dividend those shares were to carry only a 5 per cent. fixed dividend. The special dividend would amount to nearly £460,000. The shareholders then sold the shares to another private company, the P. company, at a price of nearly £460,000—roughly equal to the anticipated special dividend. The P. company was only able to pay for the shares because of the special dividend it received on them.

The P. company also applied to the motor company for 400,000 5 per cent. preference £1 shares (freshly issued) and on the next day sold them to the original appellant shareholders for £400,000, that sum being paid by the appellants out of the £460,000 they had received for the 80,000 ordinary shares. Thus, by the end of December, 1949, the motor company had distributed £460,000 as special dividend, which had found its way back to the appellants, who had reinvested £400,000 of it as capital in the motor company and had kept £60,000 in cash. The P. company had received 80,000 £1 shares which, the future dividend being fixed at 5 per cent., were now worth only £80,000, and it sold them to a subsidiary company for that sum. The P. company, as a company which dealt in stocks and shares, was entitled for tax purposes to deduct losses on its deals from the dividends it received, and having bought the shares for £460,000 and sold them for £80,000, and incurred a loss of £380,000, was left with a net profit of only £80,000 on which it had to pay tax.

Similar transactions were carried out in the case of two other private motor companies in which the appellants also held the shares, and taking the transactions of all three companies together, the companies distributed £1,764,136 as special dividends, most of which found its way back to the appellants, who received £1,661,722 in cash, of which they had reinvested £1,185,631 as capital in the companies and kept £476,091 in cash. It was not disputed that all the transactions were genuine and intended to have their purported effect, and if accepted at their face value the appellants had disposed of their shares for a capital payment of £1,661,722, and had derived no income on which they could be taxed. On a claim by the Commissioner of Taxation, however, that within the meaning of section 260 of the Act there had been an "arrangement" which had or purported to have "the purpose "or effect" of "avoiding" a "liability imposed" by the Act, and that the special dividends amounting to £1,764,136 formed part of the assessable income of the appellants for the years ending June 30, 1950 and 1951:—

Held, that the transactions were an "arrangement" the purpose and effect of which was, inter alia, to increase the capital of the motor companies in a way which would attract as little tax as possible, and to enable the original shareholders—the appellants—to receive nearly £500,000 in cash without paying tax on it, and that looking at the arrangement as a whole it was caught by section 260. The whole of the transactions showed that there was concerted action to an end, and that one of the ends sought to be achieved was the avoidance of liability for tax. "As against "the commissioner," therefore, so far as it had that purpose and effect the arrangement was "absolutely void," and he was entitled completely to disregard it and ignore the transactions so far as they had that purpose and effect. He could ignore the arrangement in so far as the appellants transferred the special dividend rights (with the shares) to the P. company for money—for it was that transaction which gave the character of capital to the money received by the appellants, and when that transaction was ignored the special dividends were to be deemed for this purpose to be still held by the appellants, and the commissioner was entitled to treat them as income derived from the shares and taxable accordingly. Further, the appellants were liable to a penalty of over £600,000 which had been imposed on them by the commissioner under section 226 (2) of the Act.

"Arrangement" is apt to describe something less than a binding contract or agreement, but it must in section 260 comprehend not only the initial plan but also all the transactions by which it is carried into effect. "Purpose" means, not motive but the effect which it is sought to achieve—the end in view. "Effect" means the end accomplished or achieved. "Avoid" is used in its ordinary meaning—to "avoid a liability imposed" means to take steps to get out of the reach of a liability which is about to fall—not which has already fallen—on a person. The whole set of words denotes concerted action to the end of avoiding tax. To bring the arrangement within the section one must be able to predicate—by looking at the overt acts by which it was implemented—that it was implemented in that particular way to avoid tax. If the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section.

W. P. Keighery Pty. Ltd. v. *Commissioner of Taxation* [1958] Argus L.R. 97; *Deputy Federal Commissioner of Taxation* v. *Purcell* (1921) 29 C.L.R. 464; *Jaques* v. *Federal Commissioner of Taxation* (1924) 34 C.L.R. 328, and *Clarke* v. *Federal Commissioner of Taxation* (1932) 48 C.L.R. 56 considered.

Bell v. *Federal Commissioner of Taxation* (1953) 87 C.L.R. 548 approved.

Judgment of the Full Court of the High Court of Australia affirmed.

APPEAL (No. 7 of 1958), by special leave, from a majority judgment of the Full Court of the High Court of Australia (May 31, 1957), allowing an appeal by the respondent, the

Commissioner of Taxation, from a judgment of the High Court in its original jurisdiction (August 15, 1956) which had allowed appeals by the appellant taxpayers against amended assessments of income tax for the years of income ended June 30, 1950 and 1951.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: The question in this case was: What was the assessable income of the appellants for the years which ended on June 30, 1950, and June 30, 1951? In particular, did it include certain sums declared by three companies as special dividends amounting in all to £1,764,136? The matter had given rise to considerable difference of opinion in the High Court of Australia. Kitto J., who heard the case at first instance, decided that those sums did not form part of the assessable income of the appellants. But the Full Court, by a majority, consisting of Dixon C.J., McTiernan, Williams and Fullagar JJ. (with Taylor J. dissenting), held that they did form part of the assessable income of the appellants and that they must pay tax on it and also a penalty. Very large sums of money were involved.

In the autumn of 1949 the position was that three private companies, Lanes Motors Pty. Ltd., Neals Motors Pty. Ltd. and Melford Motors Pty. Ltd. (which dealt in motor-cars), had made large profits and were still making them. Under Australian law those profits would ordinarily be liable to a heavy tax. If they were distributed to the shareholders (the appellants) as dividends in cash or as bonus shares, the shareholders—being wealthy persons—would be liable to pay tax at the rate of 15s. in the pound. If the profits were not distributed to the shareholders by December 31, 1949, but kept in the coffers of the company, the company would be liable—under Division 7 of the Act—to pay the tax which the shareholders would have paid, that was, at 15s. in the pound.

In December, 1949—before the last day—several transactions took place. For simplicity, what happened in the case of one of the private motor companies only will be considered: but all three carried out similar transactions. The company amended its articles of association so as to give special dividend rights to 80,000 ordinary £1 shares, which entitled the holders of the shares to a dividend of £5 15s. 10d. on every £1 share. That came to a total of nearly £460,000 as special dividend. After the payment of that dividend, those shares were to carry only a 5 per cent. fixed dividend. The original shareholders then sold those shares to a company called Pactolus Limited (which was a private company controlled by a consulting accountant) at a price of nearly £460,000—roughly equal to the anticipated dividend. The Pactolus company paid to the original shareholders the price by cheque, and at about the same time received from the motor company a cheque for the special dividend. The two cheques were for about the same amount—£460,000. The Pactolus company was only able to pay for the shares because of the special dividend it received on them.

The Pactolus company also applied to the motor company for 400,000 5 per cent. preference shares (freshly issued) and paid for them by a cheque in favour of the motor company for £400,000. On the next day the Pactolus company sold those 400,000 shares to the original shareholders (from whom they had bought the 80,000 ordinary shares) at a price of £400,000. The original shareholders paid that sum, by cheque in favour of the Pactolus company, out of the £460,000 they had received for the 80,000 ordinary shares.

All the cheques in the above transaction were banked simultaneously, with the result that by the end of December, 1949, the motor company had distributed £460,000 as special dividend. That had found its way back to the original shareholders, who had received £460,000, of which they had reinvested £400,000 as capital in the company and kept £60,000 in cash. The Pactolus company had received 80,000 shares on which it was thenceforward only entitled to a fixed dividend of 5 per cent. Those were now worth £80,000, and the Pactolus company sold them to a subsidiary company for that sum in cash.

The Pactolus company was, of course, liable to pay tax on the special dividends it received: but it was a company dealing in stocks and shares, and as such it was entitled to deduct losses on its deals from the dividends it received. On the purchase and resale of the shares it had made a loss. It had bought the shares for £460,000 and sold them for £80,000—a loss of £380,000. That loss could be set against the special dividend which it had received of £460,000, leaving it with a net profit of only £80,000 on which it had to pay tax.

So much for the one company. Taking the transactions of all three companies together the result at the end of it all was that the motor companies distributed £1,764,136 as special dividends. Most of that found its way back to the original shareholders, who received £1,661,722 in cash, of which they had reinvested £1,185,631 as capital in the companies and kept £476,091 in cash.

The Pactolus company had received 161,213 shares on which it was thenceforward entitled to a fixed dividend of 5 per cent. The Pactolus company had also retained £102,414 in cash.

It was not disputed that all the transactions were genuine and not shams. They were all intended to have the effect they purported to have. If the commissioner was bound to accept them at their face value, then the shareholders had disposed of their shares for a capital payment of £1,661,722. They had derived no income and were not liable to tax thereon. If the transactions were to be questioned, it could only be by virtue of section 260 of the Commonwealth Income Tax and Social Services Contribution Assessment Act, 1936–1951. It was in these terms: "Every contract, agreement, or arrangement "made or entered into, orally or in writing, whether before or "after the commencement of this Act, shall so far as it has or "purports to have the purpose or effect of in any way, directly "or indirectly—(*a*) altering the incidence of any income tax; "(*b*) relieving any person from liability to pay income tax or make "any return; (*c*) defeating, evading, or avoiding any duty or "liability imposed on any person by this Act; or (*d*) preventing "the operation of this Act in any respect, be absolutely void, as "against the commissioner, or in regard to any proceeding under "this Act, but without prejudice to such validity as it may have "in any other respect or for any other purpose."

The Commissioner of Taxation said that the section covered this case because there was, he said, an "arrangement" which had or purported to have "the purpose or effect" of "avoiding" a "liability imposed" on any person by the Act.

1958. May 5, 6, 7, 8, 12. *Sir Garfield Barwick Q.C.*, *R. M. Eggleston Q.C.*, *J. A. Nimmo Q.C.* (all of Australia) and *Robert Gatehouse* for the appellants. The basic facts are common to all the assessments. Kitto J., the trial judge, was bound to accept *Bell* v. *Federal Commissioner of Taxation*[1] as binding, and a great deal of the judgments of the Full Court is founded on that case which, it will be submitted, was wrongly decided. If private companies remain such on the last day of the tax year, then they have to distribute the greater part of their distributable profits among the shareholders or else pay a tax on the amount they ought to have distributed—and that is worked out by the statute at the rate their shareholders would have paid tax if the distribution had been made on the last day of the tax year. A year or two after the events of the present case the statute was altered to make it a flat rate of 10s. It is conceded by the commissioner that but for section 260 the series of transactions in this case would not have attracted any tax to the appellants. There would have been a sale of the shares, and the money they received was the price of the shares and was not income in their hands within the Act. But the commissioner said that section 260 enabled him to ignore the transfers and treat them as void, and therefore to treat the appellants as notionally still shareholders in respect of these transferred shares and as notionally in receipt of the dividends declared on them and to assess them on the full amount of that dividend. The appellants did not, of course, get the full amount of the dividend; it fell short in money by £102,414, and it fell short in value by another 161,213 shares which the Pactolus company had received.

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[1] (1953) 87 C.L.R. 548.

The submission is that section 260 relates to contracts, agreements or arrangements which will, if they are allowed to operate, displace what may be called an accrued liability under this Act. The liability referred to in (*c*), "imposed on any person," refers to an accrued liability—it refers to the general liability to include in assessable income income if and when earned, and the word "if" is the most critical one. The section cannot in any event apply where no more can be said than that a liability to tax would or might arise if some event occurred in the future.

The section, on which alone the commissioner relies for the justification for these assessments, is referring to the operation of the arrangement (to take one head); one looks to see whether what is said by the arrangement would operate to do one of the forbidden things; if so, it can be disregarded. The word "avoid" in (*c*) of section 260 is no different from "evade," and is used in the sense of "displace" or "render ineffective." One judge below accepted that reading; others used the word in the sense that one avoids something when one precludes the occasion arising. That, it is submitted, is not the meaning of the word in this section, which is speaking of the displacement of something that one is bound to suffer. The "liability imposed on "any person" in (*c*) of section 260 is, in relation to dividends, only imposed at the point of receipt of the dividend. The purpose spoken to in the section is the purpose of the arrangement itself, and the purpose of the arrangement is what it does if it is given validity. One is not concerned with motive. It is next submitted that a conveyance or transfer of title cannot fall within the section. Further, the word "arrangement" in the section is only satisfied by a consensual arrangement having legal force.

The section deals with an attempt to avoid liability to tax which the facts otherwise disclose. In its origin the section was aimed at agreements inter partes which would alter the incidence of the tax or the liability to pay tax. It is submitted that the section cannot be used at all in this fiscal area because it is really a section devised to execute a social policy. As to what the section meant before the insertion in 1936 of the words "as "against the commissioner," see *De Romero* v. *Read*.[2] By the introduction of those words the section was stultified and thereafter had no operation at all. Alternatively, if this section can be used in the fiscal area, then the only way is to pay strict attention to the exact nature of the liability; the use of the section must be limited to arrangements which attempt to displace an accrued liability. [Reference was made to *Deputy Commissioner of Taxation* v. *Purcell*,[3] *Jaques* v. *Federal Commissioner of Taxation*,[4] which was referred to on the question of "motive" being different from "operation," and *Clarke* v. *Federal Commissioner of Taxation*.[5]] In *Bell's* case [6] one has rather a sense of motive than of looking at the effect of the transaction; it was there said that there was a contract or arrangement which demonstrated a motive to avoid tax. If the word "purpose" is used in the sense of motive, one gets into a great number of difficulties. A man must be found really in possession of what is his income before he can be taxed under section 260; in *Bell's* case [6] he is not found in possession of a dividend which he derived within the meaning of the Act; in that case there is error in the approach which the court made to the matter, and it is submitted that it was wrongly decided. [Reference was also made to *W. P. Keighery Pty. Ltd.* v. *Commissioner of Taxation* [7] and to *Commissioner of Taxation* v. *Sidney Williams (Holdings) Ltd.*[8]] Section 260 does not prevent a taxpayer from so arranging his affairs by real and effective transactions that his liability to taxation is less than it would have been if he did not so dispose of his property: *In the Estate of William Vicars, decd.*[9]

Summarizing, as the case is put primarily, section 260 has been stultified in 1936; if that is not acceptable, it is submitted that the section only applies where there is a liability imposed on a person, and in relation to dividends that means dividends which have been derived by that person. The word " avoid " means displace the liability. The " purpose " spoken to is the purpose of the arrangement, which means its operation, what it does, and not motive. " So far as " means to the extent to which it operates. " Arrangement " is limited to consensual legal arrangements; it cannot extend to a conveyance in its character of a conveyance. The assessment of the commissioner must be justifiable on objective facts, minus only the legal effect of the contract or arrangement; it permits no construction of a notional situation. None of the dividends in fact paid to Pactolus Ltd. formed part of the assessable income of any of the appellants. The commissioner was not entitled to disregard any part of the transaction between the appellants and Pactolus Ltd. Section 260 does not apply where the transaction sought to be impeached has other purposes or effects than the avoidance of taxation; and in any case can only apply to such a transaction or to such a severable part of a transaction as has no other purpose or effect than to avoid taxation.

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[2] (1932) 48 C.L.R. 649, 655, 659, 668.

[3] (1921) 29 C.L.R. 464, 465 et seq.

[4] (1924) 34 C.L.R. 328, 330 et seq.

[5] (1932) 48 C.L.R. 56, 75.

[6] 87 C.L.R. 548.

[7] [1958] A.L.R. 97, 103.

[8] [1957] A.L.R. 1204; [1958] A.L.R. 108.

[9] (1944) 45 S.R.(N.S.W.) 85, 93.

R. M. Eggleston Q.C. following. In *Jaques's* case,[10] *Clarke's* case [11] and *Bell's* case [12] the judges all said that the transaction had no other purpose or effect than to defeat the taxation liability. In so far as the arrangement has the purpose or effect of avoiding tax then it is void against the commissioner, but its other purposes and its other effects remain operative. In section 260 this result is brought about by the use of the words " without prejudice " to its validity, which means, if the transaction can be avoided without prejudicing its operation in any other respect. Here, from beginning to end the shares were Pactolus's. One of the purposes of the transaction was to make Pactolus the owner of the shares; one cannot ignore that and say that it was an unintended effect. It was not unintended and, indeed, had very real consequences. It made Pactolus the controller of a sufficient quantity to enable it to adopt any special resolutions. These were effects which were intended and they could not be ignored without prejudicing one of the purposes of the transaction.

J. B. Tait Q.C., *Douglas I. Menzies Q.C.* and *K. A. Aickin*

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[10] 34 C.L.R. 328.

[11] 48 C.L.R. 56.

[12] 87 C.L.R. 548.

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v.
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TAXATION.

Q.C. (all of Australia) for the respondent. The respondent supports the decision of the majority judges and their reasons, and says that they are right, and that the assessment should be upheld. It is submitted that in the application and operation of section 260 the following propositions are correct:

(1) An " arrangement " which is struck at by the section includes an understanding between persons—an understanding which may not have a binding effect in law or be enforceable, but an understanding, provided it is carried out. If it has not been put into operation it has no effect to avoid tax liability. It is submitted: (i) that all the judges held that there was an arrangement within the section. (ii) There was here in fact a preliminary pre-existing understanding; it is not alleged that it was a binding contract, but it is alleged that on the facts it is clear that at a certain stage before these vital transactions were proceeded with there was an understanding, and that can be looked at to ascertain the purpose of the whole arrangement. (iii) On the facts of this case that purpose, that intention to avoid tax liability, can be found both by examination of the preliminary understanding and from the acts themselves—from what was actually done.

(2) " Purpose " is a necessary and relevant element in the application of the section. The view the respondent supports is perhaps best expressed in the judgment of Williams J. in the present case: " The purpose of a contract, agreement or " arrangement must be what it is intended to effect and that " intention must be ascertained from its terms. These terms " may be oral or written or may have to be inferred from the " circumstances but, when they have been ascertained, their " purpose must be what they effect." The result of that view is that one needs here both purpose and effect.

(3) The sole purpose to avoid tax liability is not essential. As to this, on the respondent's view of the facts what was done here took the form it did for the one purpose and one object of avoiding the tax liability.

(4) There must be concerted action. The section contemplates a contract, agreement or arrangement, and not only a contract or agreement, and the arrangement covers consensus, something between persons inter partes.

(5) The avoidance of liability to tax, which is the purpose and effect of the arrangement, does not mean a liability that has already arisen. This, of course, is the view of all the judges.

(6) The arrangement when carried out may involve the transfer of property. Indeed, the transaction to be effective for the purpose must necessarily involve and affect legal rights and obligations, and it is these legal rights and obligations that the transaction affects.

(7) Not every part of the arrangement carried out is struck out by the section; it only strikes out those parts which have the purpose and effect of avoiding liability to tax. That is, of course, what the section says.

(8) Lastly, the section is annihilating only; it is not a taxing section; and it follows that when the section has done its work and has struck out the arrangement so that the commissioner can disregard these transactions, then he must find on the facts that are left a tax situation, and he cannot invent or tax on notion.

The majority judges decided as they did by virtue of the above-stated principles, and they had no doubt, on an examination of the facts, that there was an arrangement within the section. [Reference was made to *Bell's* case.[13]] Section 260 having struck out the arrangement, there is left standing the £102,414 as a reward or remuneration for services rendered—that is the only way in which it can be regarded—which must be treated as income of the appellants.

Menzies Q.C. following. Sir Garfield Barwick's primary and most far-reaching argument was, in short, that section 260 has no effect at all. He said that before 1936 the only effect that the section had was inter partes, and that it said nothing with regard to the relationship between the taxpayer and the Revenue. And his second step was that when the amendment was made in 1936 by the inclusion of the words which would confine the effect of the section to relations between the taxpayer and the Revenue the section had no operation at all. It is submitted that section 260 from the start had fiscal effect and always did, and that is supported by the actual words of the section. The liability imposed in (*c*) of section 260 is from citizens to the Revenue and has no relation to inter partes at all. The section uses language appropriate only to the relationship between citizens and Revenue, and there is no ground whatever for saying that the section is not concerned with fiscal matters. It is clear that the object of the section is to prevent the escape of obligations owing to the Revenue. It has been held by the courts from the outset that section 260 does have fiscal operation. *De Romero* v. *Read*[14] was relied on by Sir Garfield to support his contention that the object of the section was to deal with relations inter partes and had no fiscal operation. *Purcell's* case,[15] *Jaques's* case[16] and *Clarke's* case,[17] however, were all decided before 1936, when the change was made, and in each of them it was part of the decision that the object of section 260 was a fiscal matter. The conclusion is inescapable that at all times and today this section had and has fiscal operation.

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[13] 87 C.L.R. 548, 574.

Sir Garfield's second argument was that section 260 applies to the duty or liability only to include in a return income already derived—accrued income—and that it does not operate in respect of prospective income. It is submitted that the statute must be looking to something other than income which has already been derived, because it can only be applied to a case where escape is made before the income is derived. The judgments in the *Jaques*[18] and *Clarke*[19] cases are inconsistent, as is *Bell's* case,[20] with the argument for the appellants that the section only applies where the income has been already derived. Sir Garfield said that "avoid" means "displace." It is submitted that "avoid" means that one escapes something which is coming, and that the attempt to get away from the primary meaning of the word and attribute to it a secondary meaning cannot stand and gets no support from the context.

Sir Garfield's third argument was that section 260 cannot avoid a transfer of property. That is wrong in principle because this section is not dealing with contracts, agreements or arrangements that are merely executory; it is dealing with contracts, agreements and arrangements by which something is done under them.

Sir Garfield said that *Bell's* case[20] was wrong because it was inconsistent with *Jaques's* case[21] and *Clarke's* case[22] because there was not an avoidance of a legal transaction. Taylor J. in the present case clearly treated *Clarke's* case[22] in the only way it could be treated; he treated *Clarke's* case[22] and *Bell's* case[23] as having been decided on the same basis—that a transfer had been avoided by virtue of the operation of the section. If the Board were to give effect to this particular argument of Sir

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[14] 48 C.L.R. 649, 657, 674.
[15] 29 C.L.R. 464, 466.
[16] 34 C.L.R. 328.
[17] 48 C.L.R. 56.
[18] 34 C.L.R. 328.
[19] 48 C.L.R. 56.
[20] 87 C.L.R. 548.
[21] 34 C.L.R. 328.
[22] 48 C.L.R. 56.
[23] 87 C.L.R. 548.

Garfield it would be necessary not only to reverse the High Court in the instant case, but to overrule *Bell's* case,[23] *Clarke's* case [24] and *Jaques's* case,[25] and he does not suggest that the two latter cases are otherwise than correct.

"Purpose" in section 260 means "deliberate action to an "end," and that is the sort of purpose that the section requires. It is intended to be a comprehensive section. "Purpose" has a purpose to serve in this particular section. Purpose is not effective unless the purpose is carried into effect in some way. Here there is an arrangement which had both purpose and effect. One looks at the whole history of the transaction from start to finish to find out what was intended. In all the cases the judges have paid attention to the intention of the parties, and did so properly in this case. Sir Garfield translates purpose or intention into motive. Once the section has operated here one is led to a situation that is exactly the same as was that in *Bell's* case,[26] and that is sufficient to show a tax situation.

In 1936 the State Acts of New South Wales and Victoria on this matter were brought into line with the Commonwealth Act by the inclusion of the same words "as against the "commissioner."

It is a matter of fact that the transfers were signed, lodged and registered and that Pactolus became the registered holders of the shares; but it is not a matter of fact that the ownership changed; that is a matter of law. In law they have no effect; the transfers are avoided and Pactolus did not become the owner, and so far as the commissioner is concerned the shareholders remained the owners of the shares. There is a line of authority which points to the conclusion that there was in this case an arrangement to which the section could be applied; there is a tax situation, the assessments were correct, and the taxpayer, because of the operation of the section, failed to include the sums in question in his return of income.

Sir Garfield Barwick Q.C. in reply. There has been only one case—*Bell's* case [26]—on the construction of this section since it was amended, and the purpose of this appeal is to obtain an independent view from this Board on what the section means. This case must have very wide implications. The right construction of the section is: if the income has come home liability has come home, and one cannot by an agreement, contract or arrangement mask that fact. The respondent says that it means: defeat the possibility that liability might be imposed—that you must not take steps to see that no liability comes to you under this Act. How does one defeat "becoming "liable?" The words should be given their natural meaning. The Act imposes a liability at the point of receipt of income and at no earlier point.

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[23] 87 C.L.R. 548.
[24] 48 C.L.R. 56.
[25] 34 C.L.R. 328.
[26] 87 C.L.R. 548.

"Purpose" does not mean "motive"; it means what did the contract do; what is its operation? It is agreed that the intention was to do what they did; the purpose, it is accepted, is the intended effect—and that means the operation of the contract. So ultimately there is agreement between us that it is the effect of what is done that may bring the transaction down, not the motive. There was not a moment of time either before or during or after this arrangement when there was a liability under the Act. *Bell's* case [26] alone says that a conveyance can be struck down by the section; neither *Jaques's* case [27] nor *Clarke's* case [28] warrants the conclusion that a conveyance as such is within the section. *Keighery's* case [29] was one of the repercussions of *Bell's* case.[30]

July 7. The judgment of their Lordships was delivered by Lord Denning who, after stating the decisions of the courts below, continued: In these days, when rates of tax are high, it is natural enough for a man to seek so to order his affairs that the tax attaching under the appropriate Acts is less than it otherwise would be. In England there is no general provision against it, but special provisions have been enacted so as to counter particular devices and to deal with particular situations. In Australia there is a general provision which is said to cover "tax "avoidance," and it comes now before their Lordships for the first time. But before setting out the section, their Lordships think it better to summarize the facts which give rise to the question.

[His Lordship stated the facts as set out above and continued:] Sir Garfield Barwick, for the taxpayers, submitted to their Lordships that section 260 had no application to this case. He put in the forefront of his argument two submissions which were not made to the High Court of Australia. First, Sir Garfield Barwick submitted that the section was of no effect at all. He

[26] 87 C.L.R. 548.
[27] 34 C.L.R. 328.
[28] 48 C.L.R. 56.
[29] [1958] A.L.R. 97.
[30] 87 C.L.R. 548.

referred to the history of the section and pointed out that before 1936 the words "as against the commissioner" were not there. He said that in those days the section had only a social effect—an effect as between two or more subjects—not allowing one of them to put on to another the duty to make a return of tax or to bear it, and so forth. It had, he said, no fiscal effect—no effect, that is, as against the commissioner. Then in 1936, by inserting the words "as against the commissioner," the section was deprived of any effect as between subjects: and, as it already had no effect as against the commissioner, it had thenceforward no effect at all. The insertion of those words, he said, stultified the section. Their Lordships cannot accept this argument. They are quite clearly of opinion that long before 1936 the section had a fiscal effect. Its principal effect was to avoid transactions as against the commissioner—as in cases such as *Clarke* v. *Federal Commissioner of Taxation.*[1] But it had—as originally drafted—an unexpected effect in that in *De Romero* v. *Read*[2] it was held to avoid a transaction between subjects. It seems to their Lordships that the reason for the insertion of the words "as against "the commissioner" was to do away with the decision in *De Romero* v. *Read.*[2]

Next, Sir Garfield Barwick submitted that in section 260 (*c*) the words "liability imposed on any person" meant a liability which had already accrued: and that "avoid" meant displace. He said that in order that an arrangement should be avoided, it must be an arrangement which sought to displace a liability which had already come home to a taxpayer—in respect of income which had already been derived by him. Their Lordships cannot accept this submission. They are clearly of opinion that the word "avoid" is used in its ordinary sense—in the sense in which a person is said to avoid something which is about to happen to him. He takes steps to get out of the way of it. It is this meaning of "avoid" which gives the clue to the meaning of "liability imposed." To "avoid a liability imposed" on you means to take steps to get out of the reach of a liability which is about to fall on you. If the submission of Sir Garfield Barwick were accepted, it would deprive the words of any effect: for no one can displace a liability to tax which has already accrued due, or in respect of income which has already been derived. Their Lordships notice that, although this point was not raised in the High Court, Taylor J. did consider it, and they find themselves in agreement with what he said upon it.

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[1] (1932) 48 C.L.R. 56.

[2] 48 C.L.R. 649.

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So much for Sir Garfield Barwick's new arguments. Their Lordships turn to consider the other points raised in the case. Their Lordships are of opinion that the word " arrangement " is apt to describe something less than a binding contract or agreement, something in the nature of an understanding between two or more persons—a plan arranged between them which may not be enforceable at law. But it must in this section comprehend, not only the initial plan but also all the transactions by which it is carried into effect—all the transactions, that is, which have the effect of avoiding taxation, be they conveyances, transfers or anything else. It would be useless for the commissioner to avoid the arrangement and leave the transactions still standing. The word " purpose " means, not motive but the effect which it is sought to achieve—the end in view. The word " effect " means the end accomplished or achieved. The whole set of words denotes concerted action to an end—the end of avoiding tax.

But, said Sir Garfield, if such a wide interpretation is given to the words, where is the section to stop? Does it enable the commissioner to avoid all transactions by which a man seeks to escape a liability to tax which is about to fall on him? He gave numerous illustrations to show that the Parliament of Australia cannot have intended so sweeping a result. Take the case of a man who sells shares cum dividend—because he does not wish to pay the tax on the dividend when received: or of a private company which is turned into a non-private company in order to escape Division 7 tax: and so forth. Can the commissioner go behind those transactions?

The answer to the problem seems to their Lordships to lie in the opening words of the section. They show that the section is not concerned with the motives of individuals. It is not concerned with their desire to avoid tax, but only with the means which they employ to do it. It affects every " contract, agreement or " arrangement " (which their Lordships will henceforward refer to compendiously as " arrangement ") which has the purpose or effect of avoiding tax. In applying the section you must, by the very words of it, look at the arrangement *itself* and see which is *its* effect—which *it* does—irrespective of the motives of the persons who made it. Williams J. put it well when he said: " The purpose of a contract, agreement or arrangement must be " what *it* is intended to effect and that intention must be ascer- " tained from its terms. Those terms may be oral or written or " may have to be inferred from the circumstances but, when they " have been ascertained, their purpose must be what they effect."

In order to bring the arrangement within the section you must be able to predicate—by looking at the overt acts by which it was implemented—that it was implemented in that particular way so as to avoid tax. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section. Thus, no one, by looking at a transfer of shares cum dividend, can predicate that the transfer was made to avoid tax. Nor can anyone, by seeing a private company turned into a non-private company, predicate that it was done to avoid Division 7 tax: see *W. P. Keighery Pty. Ltd.* v. *Commissioner of Taxation.*[3] Nor could anyone, on seeing a declaration of trust made by a father in favour of his wife and daughter, predicate that it was done to avoid tax: see *Deputy Federal Commissioner of Taxation* v. *Purcell.*[4] But when one looks at the way the transactions were effected in *Jaques* v. *Federal Commissioner of Taxation,*[5] *Clarke* v. *Federal Commissioner of Taxation*[6] and *Bell* v. *Federal Commissioner of Taxation*[7]—the way cheques were exchanged for like amounts and so forth—there can be no doubt at all that the purpose and effect of that way of doing things was to avoid tax.

Applying these principles to the present case, the first question is—Was there an arrangement? The answer is "Yes." The whole complicated series of transactions must have been the result of a concerted plan; and the nature of the plan is to be ascertained by the overt acts done in pursuance of it.

Next, what was the purpose of the arrangement? It can clearly be seen to be three-fold: (i) To increase the capital of the motor companies—and to do it by ploughing back over £1,000,000 of the profits into the business—and to do it in a way which would attract as little tax as possible. (ii) To enable the original shareholders to receive a large sum—nearly £500,000 in cash—without paying tax on it. (iii) To enable the Pactolus company to make a handsome profit in return for its part in the affair. (It is to be noticed that—in so far as it was the purpose of the transaction to let the motor companies escape from the additional tax under Division 7—this could have been effected by turning the motor companies into non-private companies.)

Finally, what was the effect of the arrangement? It was this:

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[3] [1958] A.L.R. 97.
[4] (1921) 29 C.L.R. 464.
[5] (1924) 34 C.L.R. 328.
[6] (1932) 48 C.L.R. 56.
[7] (1953) 87 C.L.R. 548.

(i) The motor companies received new capital of £1,185,631—of which they were much in need for the conduct of their businesses. (ii) The original shareholders received a capital payment of £1,661,722 in return for the sale of shares, but had received no dividend on which they could be taxed. (iii) The motor companies distributed a dividend of £1,764,136 which was a sufficient distribution to enable them to avoid being liable for tax on undistributed profits under Division 7. (iv) The Pactolus company made a profit on its share dealings. It had received 161,213 £1 shares; and it had also £102,414 in cash on which it was liable to pay tax.

It is clear from this analysis that the avoidance of tax was not the *sole* purpose or effect of the arrangement. The raising of new capital was an associated purpose. But nevertheless the section can still work if one of the purposes or effects was to avoid liability for tax. The section distinctly says " *so far* as it has " the purpose or effect. This seems to their Lordships to import that it need not be the sole purpose.

Looking at the whole of this arrangement, their Lordships have no doubt that it was an arrangement which is caught by section 260. The whole of the transactions show that there was concerted action to an end—and that one of the ends sought to be achieved was the avoidance of liability for tax.

This question then arises: What is the effect of section 260 on that arrangement? It is quite clear that nothing is avoided as between the parties but only as against the commissioner. As against him the arrangement is " absolutely void " so far as it has the purpose or effect of avoiding tax. This is not a very precise use of the words " absolutely void." Ordinarily, if a transaction is absolutely void, it is void as against all the world. In this case what is meant is that the commissioner is entitled completely to disregard the arrangement—and the ensuing transactions—so far as they have the purpose or effect of avoiding tax. In the words of the courts of Australia, it is an " annihilating " provision—the commissioner can use the section so as to ignore the transactions which are caught by it. But the ignoring of the transactions—or the annihilation of them—does not itself create a liability to tax. In order to make the taxpayers liable, the commissioner must show that moneys have come into the hands of the taxpayers which the commissioner is entitled to treat as income derived by them. Their Lordships agree with the way in which Fullagar J. put it in his judgment: " Section 260 alters " nothing that was done as between the parties. But, for the "purposes of income tax, it entitles the commissioner to look at "the end result and to ignore all the steps which were taken in "pursuance of the avoided arrangement."

In this case the commissioner must accept the arrangement in so far as it had the effect of creating special dividend rights in the original shareholders—for that did nothing to avoid tax: but he can ignore the arrangement in so far as the original shareholders transferred those dividend rights (with the shares) to Pactolus for money—for it was that transaction which gave the character of capital to the money received by the shareholders. When that transaction is ignored, it becomes apparent that special dividends were declared on shares which are to be deemed for this purpose to be still held by the original shareholders. Those dividends amount to £1,764,136 paid out by the company. If and so far as the commissioner can show that those special dividends reached the hands of the original shareholders, he is entitled to treat it as income derived by them from the shares. Now the commissioner can trace the sum of £1,661,722 in cash actually into the hands of the original shareholders. He is entitled, therefore, to treat it as income derived by them. He cannot trace the balance of £102,414 actually into their hands. It remained in the pocket of Pactolus Limited. It was ostensibly the profit of Pactolus on buying the shares. But when the transfer is ignored, that profit is seen to be nothing more nor less than remuneration which the original shareholders allowed Pactolus to retain for services rendered. The position is the same as if the shareholders had received it as part of the special dividend and then returned it to Pactolus as remuneration. The commissioner can therefore treat this £102,414 also as income derived by the shareholders.

The commissioner cannot avoid or ignore the taking up of 400,000 £1 preference shares: for that did nothing to avoid tax. Nor can he avoid or ignore the fact that Pactolus now holds 161,213 shares shorn of special dividend rights—because that does nothing to avoid tax. He can only avoid or ignore the transfer in so far as it transferred the special dividend rights.

In the course of the argument Sir Garfield Barwick submitted that *Bell's* case [8] was wrongly decided. In the opinion of their Lordships it was rightly decided, and the exposition of the law there given by the High Court of Australia is a valuable guide to the true understanding of the section.

Sir Garfield Barwick sought to raise before their Lordships a further point which was not raised below. The commissioner assessed the shareholders in the tax due on the moneys received by them—and in addition included a sum as a penalty under section 226 (2) of the Act. This penalty amounts to over £600,000. Sir Garfield sought to say that section 226 (2) did not apply because the taxpayer could not properly be said to have "omitted" the income from his return—seeing that it was not income when he received it or when he made his return—but only has become so ex post facto when the commissioner decided to treat it so. Their Lordships were not disposed to allow Sir Garfield to raise this point as it had not been raised before and does not appear in the case of the appellants—but in any case they think it is a bad point. In the events that have happened, the money has been determined to be assessable income. As such it ought to have been included—and was not. The taxpayer is therefore liable to the penalty.

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[8] 87 C.L.R. 548.

Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs.

Solicitors: *A. F. & R. W. Tweedie; Coward, Chance & Co.*

C. C.

J. C.*
1958
July 16.

ARIADNE TZAMBURAKIS AND ANOTHER . . APPELLANTS;
AND
EFTICHIA RODOUSSAKIS . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

East Africa (Tanganyika)—Practice and procedure—Limitation—Lease of share of sisal estate—Suit for an account—Preliminary issue of limitation—Suit held not time-barred—Judgment for plaintiff on trial of action—Appeal—Duty of appeal court to deal with issue of limitation—Indian Code of Civil Procedure (V of 1908), *ss.* 2, 97—*Indian Limitation Act (IX of* 1908), *s.* 3; *First Schedule, arts.* 106, 116.

By section 97 of the Indian Code of Civil Procedure (applied to Tanganyika in 1920 by Order in Council): "Where any party

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* *Present*: LORD MORTON OF HENRYTON, LORD TUCKER, and the RT. HON. L. M. D. DE SILVA.

"aggrieved by a preliminary decree . . . does not appeal from "such decree, he shall be precluded from disputing its correctness "in any appeal which may be preferred from the final decree."

The respondent, who was the co-owner as tenant-in-common with her brother of a sisal estate in Tanganyika, worked the estate in partnership with him from 1932 to April 1, 1946, when she granted him a lease of her share and interest for three years from April 1, 1946, on a royalty per ton basis. There followed thereafter a period of three months—the interregnum period—from April 1, 1949, to July 1, 1949, when the pre-lease partnership basis subsisted. The respondent, on July 23, 1952, brought an action against the appellants as administratrices of her brother's estate, claiming that he had failed to account to her for moneys payable by him to her in connexion with the estate during the period April 1, 1946, to July 1, 1949. The appellants' plea that the action was barred by the provisions of the Indian Limitation Act, 1908 (which applied in Tanganyika), was tried as a preliminary issue on the pleadings, and it was held that an amended plaint which had been filed on July 27, 1954, did not disclose a new cause of action, and that the suit was not time-barred under the Act of 1908. The case accordingly proceeded to trial on the merits (before a different judge) and judgment was given for the respondent and an account ordered to be taken.

On appeal to the Court of Appeal for Eastern Africa by the appellants, who challenged in that court, inter alia, the ruling of the judge on the limitation issue, the court were of opinion that the decision on that issue was a preliminary decree within the meaning of sections 2 (2) and 97 of the Code of Civil Procedure and that there having been no appeal entered within time against it the appellants' challenge to it was incompetent:—

Held, first, that the Court of Appeal should have entertained the appeal against the decision of the judge on the limitation issue. The decision in *Chanmalswami* v. *Gangadharappa* (1914) I.L.R. 39 Bom. 339, which overruled *Sidhanath Dhonddev* v. *Ganesh Govind* (1912) I.L.R. 37 Bom. 60, in which it had been held that decisions as to, inter alia, limitation, were preliminary decrees from which the unsuccessful parties must at once appeal by reason of section 97 of the Code, was to be preferred. A further reason why the Court of Appeal should have dealt with the issue of limitation was that section 3 of the Indian Limitation Act in terms required the dismissal of every suit instituted after the prescribed period of limitation even though this defence was not pleaded.

Muhammad Kamil v. *Musammat Imtiaz Fatima* (1909) L.R. 36 I.A. 210; 14 C.W.N. 59 considered.

In the present case no procedural defect could relieve the Court of Appeal of its duty to give effect to the statute on an appeal from a judgment given in favour of a plaintiff in respect of a time-barred cause of action.

Held, secondly, that the amended plaint disclosed no new cause of action and time must be calculated from the date of the original plaint, July 23, 1952, and that the main part of the claim, being one which amounted in law for rent under a registered lease, came, following *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur* (1916) L.R. 44 I.A. 65; I.L.R. 44 Cal.(P.C.) 759, within article 116 of the First Schedule to the Limitation Act, which specified six years as the relevant period, and was not time-barred. The claim in respect of the interregnum period could be dealt with only on the basis of a partnership, and as to that period the claim was time-barred under article 106 of the Act, which provided for a three-year period.

Order of the Court of Appeal for Eastern Africa set aside.

APPEAL (No. 5 of 1957) from a judgment of the Court of Appeal for Eastern Africa (July 18, 1956) affirming a judgment of the High Court of Tanganyika at Dar-es-Salaam (October 17, 1955).

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: The appellants in this case were the administratrices of one Nico Tzamburakis, deceased, and the respondent was his sister. The deceased and the respondent were co-owners as tenants-in-common, having shares of 70 per cent. and 30 per cent. respectively, of a large sisal estate in Tanganyika.

The suit was brought in the High Court of Tanganyika by plaint dated July 23, 1952, by the respondent as plaintiff against the estate of the deceased, represented by the present appellants, claiming that the deceased had failed to account to her for moneys payable by him to her in connexion with this estate during the period from April 1, 1946, to July 1, 1949.

The appellants pleaded, inter alia, that the claim was barred by the provisions of the Indian Limitation Act, 1908, which together with the Indian Code of Civil Procedure had been applied to Tanganyika in 1920 by Order in Council. This question was tried as a preliminary issue on the pleadings by Mahon J. who, on December 3, 1954, delivered what was described in the Record as "Judge's Ruling on Preliminary Issues," whereby he held that an amended plaint which had been filed on July 27, 1954, did not disclose a new cause of action and that the suit was not time-barred by the Indian Limitation Act.

The case accordingly proceeded to trial on the merits and was heard by Cox C.J. who, on October 17, 1955, gave judgment in favour of the respondent and ordered an account to be taken. The terms thereof were embodied in a decree bearing the same date and are set out at pages 42 to 44 of the Record in the present appeal.

It was important to observe that at the trial before the Chief Justice there was no dispute as to the liability of the deceased to account to the respondent. The defence was that he had rendered full and accurate accounts and that the respondent had received all moneys to which she was entitled and that she and the deceased had signed a document on July 14, 1949, confirming the settlement of all accounts up to June 30, 1949, and acknowledging that nothing was then due by either of them to the other. As to this document the judge accepted the respondent's evidence and upheld her plea of non est factum. The judge's decision with regard to this document was not now challenged.

At page 33, paragraph 20, the judge said: "Apart from a "technical defence which another judge of this court dismissed, "the defence to the plaintiff's claim is that she has received "everything due to her from the estate under the lease, and that "she has received full and accurate accounts. I have already "touched on the allegations that the plaintiff had not received "her full share. As regards the accounts, it was proved quite "clearly before me that proper accounts had never been "rendered."

At page 37, paragraph 31, he said: "It will, in my opinion, "probably be an extremely difficult task for accurate accounts "now to be made up because the documents are apparently "either non-existent, carefully hidden or misplaced, but the "fact remains that the plaintiff has not had proper accounts "showing her share to which she was entitled under the lease."

The appellants in their appeal to the Court of Appeal for Eastern Africa challenged the ruling of Mahon J. on the limitation issue and the decision of the Chief Justice as to the respondent's plea of non est factum. Their grounds of appeal also alleged that the judgment was against the weight of evidence. The respondent contended that there was no right of appeal from the ruling of Mahon J. which, it was contended, was a preliminary decree within the meaning of section 97 of the Indian Code of Civil Procedure. Neither party disputed the basis upon which the account had been ordered to be taken if the Limitation Act did not apply. With regard to the transactions and arrangements between the respondent and the deceased in connexion with this sisal estate of which they were tenants-in-common: from 1932 to April 1, 1946, the respondent and the deceased worked the estate in partnership, at one time on a 50 per cent. basis, but the percentage varied from time to time and by 1946 the respondent was the registered owner of 30 per cent. undivided share of the estate. The deceased was the active manager and received a salary as such. There were disputes and differences between the parties as to their proper share of the profits and in order to put matters on a more definite basis the parties entered into a lease for three years from April 1, 1946, whereby the respondent, who was described as the landlord, demised to the deceased, who was described as the tenant, as to her share and interests the hereditaments described in the schedule thereto together with the sisal factory, machinery, trollies, railway lines and other chattels and effects then on the estate and forming part of the sisal estate as a running concern and paying therefor during the term a royalty of £3 per ton on all grades of sisal and tow produced from the whole estate, subject to a provision for increase or decrease depending on rises or falls in the price of sisal. The royalty was to be paid within 30 days of the sale of sisal.

On the termination of this lease on March 31, 1949, there followed a period of three months, which had been referred to throughout as the interregnum period. As to this period the trial judge held on the evidence that the respondent was entitled to her share of the estate. At page 36, paragraph 28, he said: "The plaintiff is obviously entitled to her share in the estate "over that period, and it would appear that her share in the "estate over that period would have to be ascertained on the "basis of the relationship existing between her and her brother "prior to entering into this first lease which became effective "from April 1, 1946."

And when dealing with the form of the order he said on p. 39, paragraph 34: "As regards sub-paragraph (2) of paragraph 32 "[referring to an earlier paragraph in his judgment wherein the "plaintiff's prayer had been set out] the answer to that would "appear to be ascertainable on the basis of the partnership which "existed between the brother and sister prior to April 1, 1946, "that is to say, on a 70 per cent. figure and a 30 per cent. figure "basis, but not inclusive of any profits for the month of July, "1949, as the plaintiff had leased her share of the estate to her "brother on July 14, 1949, for Shs. 18,000/– a month with effect "from July 1, 1949, and was paid the rent for the month of "July."

As from July 1, 1949, a second lease was entered into under which all rent had been paid and ultimately in October, 1949, the estate was sold and the proceeds divided between the co-owners. No question arose in this appeal with regard to the second lease or the sale. The dispute was confined to the period of the first lease (April 1, 1946–March 31, 1949) and the interregnum period (April 1, 1949–July 1, 1949).

The leading judgment in the Court of Appeal for Eastern Africa, affirming the judgment of the trial judge, was delivered by Briggs J.A. With this judgment the other members of the court (Worley P. and Sinclair V.-P.) concurred.

The relevant provisions of the Indian Code of Civil Procedure were sections 2 (2), 2 (14), 33, 96 (1), 97 and 105 (1), and of the Indian Limitation Act, 1908, section 3, and the First Schedule, articles 89, 106, 110, 115, 116 and 120.

The Indian Code of Civil Procedure provided:

" Section 2 (2). ' Decree ' means the formal expression of an " adjudication which, so far as regards the court expressing it, " conclusively determines the rights of the parties with regard to " all or any of the matters in controversy in the suit and may be " either preliminary or final . . ."

" Explanation. A decree is preliminary when further proceedings have to be taken before the suit can be completely " disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly " final."

" Section 2 (14). ' Order ' means the formal expression of any " decision of a civil court which is not a decree."

" Section 33. The court, after the case has been heard, shall " pronounce judgment, and on such judgment a decree shall " follow."

" Section 96 (1). Save where otherwise expressly provided in " the body of this Code or by any other law for the time being " in force, an appeal shall lie from every decree passed by any " court exercising original jurisdiction to the court authorized " to hear appeals from the decisions of such court."

" Section 97. Where any party aggrieved by a preliminary " decree passed after the commencement of this Code does not " appeal from such decree, he shall be precluded from disputing " its correctness in any appeal which may be preferred from the " final decree."

" Section 105 (1). Save as otherwise expressly provided, no " appeal shall lie from any order made by a court in the exercise " of its original or appellate jurisdiction; but where a decree is " appealed from, any error, defect or irregularity in any order, " affecting the decision of the case, may be set forth as a ground " of objection in the memorandum of appeal."

The Indian Limitation Act, 1908, provided:

"Section 3. Subject to the provisions contained in sections "4 to 25 (inclusive) every suit instituted, appeal preferred, and "application made after the period of limitation prescribed there-"for by the first Schedule shall be dismissed, although limitation "has not been set out as a defence."

"FIRST SCHEDULE

Description of Suit	*Period of Limitation*	*Time from which period begins to run*
89. By a principal against his agent for movable property received by the latter and not accounted for.	3 years	When the account is, during the continuance of the agency, demanded and refused, or where no such demand is made, when the agency terminates.
106. For an account and a share of the profits of a dissolved partnership.	3 years	The date of the dissolution.
110. For arrears of rent.	3 years	When the arrears become due.
115. For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for.	3 years	When the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.
116. For compensation for the breach of a contract in writing registered.	6 years	When the period of limitation would begin to run against a suit brought on a similar contract not registered.
120. Suit for which no period of limitation is provided elsewhere in this Schedule.	6 years	When the right to sue accrues."

The Court of Appeal held that there having been no appeal entered within time from the decision of Mahon J. which, in their view, was a preliminary decree within the meaning of sections 2 (2) and 97 of the Code of Civil Procedure, the grounds of appeal seeking to attack his decision were incompetent.

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Rodoussakis.

1958. June 3, 4, 9. *Sir Frank Soskice Q.C.* and *Mark Littman* for the appellants. The first question is whether Mahon J.'s ruling on the preliminary issue of limitation amounted to a preliminary decree within section 97 of the Code of Civil Procedure; if so, it cannot be appealed against. It is submitted that it was an "order affecting the decision of the case" within section 105 (1) of the Code so as to entitle the appellants to set forth an error in such determination as a ground of objection to the final decree in the memorandum of appeal. The appellants were therefore entitled to appeal to the Court of Appeal against Mahon J.'s ruling. In section 2 (2) of the Code "decree" is defined as "the formal expression of an adjudication which . . . conclusively "determines the rights of the parties with regard to all or any of "the matters in controversy in the suit . . ." The ruling on the preliminary issue was not a decree at all; and even if it was a decree, it was not a decree within the meaning of section 2 (2) which conclusively determined the rights of the parties with regard to all or any of the matters in controversy. In any event it was not drawn up, so it still is not a decree. "Matters in "controversy in the suit" mean rights asserted in relation to the subject-matter of the lis the establishment of which entitles the suitor to the relief he claims.

On this first point—the competency of the appeal—*Chanmalswami* v. *Gangadharappa*[1] is directly in the appellants' favour. *Sidhanath Dhonddev* v. *Ganesh Govind*[2] is also in their favour on the point that the decree must be drawn up; that is relied on; they could not appeal until there was something drawn up, and there was nothing drawn up. *Naresh Mohan* v. *Brij Mohan*[3] does not, it is submitted, support the statement of Briggs J.A. in the present case that "there is the highest authority for giving "a wide interpretation to the powers of the court authorizing "separate trial of severable issues."

The test to apply in asking whether an order is final or not has been put in three ways: (1) Does the order, whichever way it is made, finally determine the matter in dispute: *Salaman* v. *Warner*[4]; *In re Herbert Reeves & Co.*[5] (2) Does the actual order finally dispose of the rights of the parties: *Bozson* v. *Altrincham Urban District Council.*[6] (3) The view of Briggs J.A.

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[1] (1914) I.L.R. 39 Bom. 339.

[2] (1912) I.L.R. 37 Bom. 60.

[3] (1933) A.I.R.(P.C.) 43.

[4] [1891] 1 Q.B. 734; 7 T.L.R. 484.

[5] [1902] 1 Ch. 29.

[6] [1903] 1 K.B. 547; 19 T.L.R. 266.

in this case—an intermediate test—it is a final order if, being decided one way, the judgment would finally dispose of the rights. In 1945 du Parcq L.J. in *Egerton* v. *Shirley* [7] said that there was a conflict between the cases of *Salaman* [8] and *Bozson*.[9] Briggs J.A. said that *Hussain Bakhsh* v. *Secretary of State* [10] expressly held that it is proper to decide a question of limitation as a preliminary issue under Ord. 14, r. 2; that, however, does not advance in any material sense the argument on the question whether this is something which finally decides the rights of the parties. [Reference was also made to *Ahmed Musaji Saleji* v. *Hashim Ebrahim Saleji* [11] and *In re J. B. Palmer's Application*,[12] which does not advance the matter.] English decisions which distinguish between an interlocutory and a final order are admittedly only applicable by analogy, but they apply the same test; the broad structure of the English legislation on the subject is material. The right test must be that in *Salaman's* case [13]—look at the nature of the application and whichever way it is decided ask, must that finally decide the matter? See also *per* Lord Evershed M.R. in *Hunt* v. *Allied Bakeries Ltd.*[14] The test applied by Briggs J.A. in the present case should be discarded; either of the other tests is in the appellants' favour, and there was not here a decree within section 2 (2) of the Code.

The second point on the competency of the appeal (assuming that the first is wrong) is that there must be a formal embodiment of the judgment in a decree. The decree is the formal expression of an adjudication. There is a considerable body of authority to the effect that within the meaning of sections 2 (2) and 97 of the Code there is no such thing as a decree until the judgment or order has been drawn up: *Bai Divali* v. *Shah Vishnav Manordas* [15]; *Sakharam Vishram* v. *Sadashiv Balshet* [16]; *Vamanacharya* v. *Govind* [17]; *Irrani* v. *Naimuddin*.[18] There can be no appeal from a judgment until there is a decree. It is for the court to draw the order up. Section 33 of the Code, which enacts that "the court, after the case has been heard, shall pronounce judg-"ment, and on such judgment a decree shall follow," strongly suggests that there are two entirely different and separate things

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[7] [1945] K.B. 107, 110; [1944] 2 All E.R. 583.

[8] [1891] 1 Q.B. 734.

[9] [1903] 1 K.B. 547.

[10] (1935) A.I.R.(Lah.) 982.

[11] (1915) L.R. 42 I.A. 91; I.L.R. 42 Cal.(P.C.) 914.

[12] (1882) 22 Ch.D. 88.

[13] [1891] 1 Q.B. 734.

[14] [1956] 1 W.L.R. 1326; [1956] 2 All E.R. 513.

[15] (1909) I.L.R. 34 Bom. 182.

[16] (1913) I.L.R. 37 Bom. 480.

[17] (1923) 25 Bom.L.Rptr. 826.

[18] (1923) 39 Cal.L.J. 251.

—judgment and decree. See also Mulla's Code of Civil Procedure, 12th ed., p. 726; and with regard to the execution of decrees, the 12th ed., p. 1365. One can only execute a decree, which represents the effect of the conclusion. A decree is an order capable of execution. Those references indicate clearly that there is no such thing as a decree until something is drawn up.

It is submitted that either Mahon J.'s adjudication found its place in the Chief Justice's decree and the appellants can appeal against that decree; or they can rely on section 105 (1) of the Code.

The second main submission, assuming that the Court of Appeal should have entertained the appeal on the limitation issue, is that either article 89 or article 106, or possibly article 110, of the First Schedule to the Limitation Act is applicable to the claim under the first lease, and the relevant period is three years. The Court of Appeal were of opinion that either article 116 or 120 was applicable, and they provide for six years. It is submitted that under the first lease the claim is one for rent, and that in respect of the interregnum period it is a claim for a partnership account or a claim against an agent.

In regard to the interregnum period the appellants must be right in submitting that the case falls within article 89, the agents article, or possibly article 106, the partners article, and in either event must succeed on that, subject to the question whether they can appeal on it at all. For the position of trustees and implied trustees, see Mitra's Limitation and Prescription, 6th ed., vol. 2, p. 663, and Rustomji's Law of Limitation, 4th ed., p. 92. In *Asghar Ali Khan* v. *Kurshed Ali Khan*[19] article 89 was held applicable; the question is whether the situation there can be equated to the facts of the present case. See also *Chandra Madhab Barua* v. *Nobin Chandra Barua*.[20] [Reference was also made to Halsbury's Laws of England, 2nd ed., vol. 24, p. 398, para. 779, for a summary of the English law in this connexion, and to the Partnership Act, 1890, s. 2.] All that need be shown is that there was a partnership during the interregnum period, and then the appellants come within article 89 or 106. Whilst it cannot be said that there is an express finding of partnership during that period, the Chief Justice made an order which cannot be justified except on that basis.

Before dealing with the claim under the first lease two small points may be disposed of. The first is the submission that the amendment to the plaint on July 27, 1954, raised a new cause of action; the relevance of it is the time from which one measures back for limitation purposes. The question is, when were the proceedings started in which the relevant relief is asked for? The relevant cause of action is asserted by the amendment. [Reference was made to Rustomji's Law of Limitation, 4th ed., pp. 250 et seq., and to *Charan Das* v. *Amir Khan*[21] and *Dipple* v. *Dipple*.[22]] The second small point is that if it is wrong to say that there was a new cause of action on amendment and the period of limitation must therefore be measured back from the date of the first plaint, July 23, 1952, and if, contrary to our submission, the period is six years, not three, the result would be that measuring it in that way it would go back to July 23, 1946, and that would leave uncovered the period April 1 to July 23, 1946, and in respect of that short period the claim would be time-barred. The transactions relevant to the permitted period can only be those which take place after July 23, 1946.

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[19] (1901) L.R. 28 I.A. 227; I.L.R. 24 All.(P.C.) 27.

[20] (1912) I.L.R. 40 Cal. 108.

With regard to the main claim under the first lease, it is submitted that what is being claimed here is rent and that article 110 is applicable. Under that lease they are payments of rent and nothing else. The lease as a whole is plastered over with all the indicia of a demise. *Daniel* v. *Gracie*[23] and *Treseder-Griffin* v. *Co-operative Insurance Society Ltd.*[24] establish (1) that it does not matter what the payment is called, and (2) that in law to be rent it must be either certain or capable of being made certain. Relating that to the terms of this lease, there was to be a money payment, and one capable of being made certain, and it is rent. [Reference was also made to Halsbury's Laws of England, 2nd ed., vol. 20, p. 158, para. 170; p. 160, para. 172, and to *Farewell* v. *Dickenson*.[25]] This, therefore, being a rent, comes within article 110—three years—unless the case of *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur*[26] stands in the way. That case held that a claim for rent under a registered lease came within article 116, which provides for six years. If the language used by the Board in *Tricomdas's* case[26] applies to a simple case of arrears of rent, it is contended that it is going too far. Rent cannot be "compensation" as used in article 116. It is also sought to distinguish that case on the facts. [Reference was

[21] (1920) I.L.R. 48 Cal. 110.

[22] [1942] P. 65, 68.

[23] (1844) 6 Q.B. 145, 151.

[24] [1956] 2 Q.B. 127, 149; [1955] 3 All E.R. 793.

[25] (1827) 6 B. & C. 251.

[26] (1915) L.R. 44 I.A. 65; I.L.R. 44 Cal.(P.C.) 759.

made to all the cases cited in *Tricomdas's* case[26] and to *Nobocoomar Mookhopadhaya* v. *Siru Mullick*[27]; *Husain Ali Khan* v. *Hafiz Ali Khan*[28]; *Ganesh Krishn* v. *Madhavrav Ravji*,[29] and *Kesu Shivram* v. *Vithu Kanaji*.[30]]

In summary, it is submitted: (1) The points as to limitation are open. (2) In any event, whether or not they are open, and certainly if they are open, the appellants must succeed in respect of the period April 1, 1946, to July 23, 1946. (3) The appellants should in any event succeed in respect of the interregnum period from April 1, 1949, to July 1, 1949, either on the basis of article 89 or 106 or 110, and failing them article 115 is applicable. (4) In respect of the first lease period they should succeed on the basis that article 110 is applicable. If *Tricomdas's* case[31] cannot be distinguished, it is one which the Board should not follow. (5) There was a new cause of action introduced on July 27, 1954, and the period of limitation, whether six or three years, should date back as from that date with the consequences that ensue. The appeal should be allowed in whole or in part.

Littman, following, referred on the competency of the appeal to *Barkat Ram* v. *Bhagwan Singh*,[32] *Zamindar of Bodinaickanur* v. *Kamarajapandia Naicker*[33] and *Muhammad Kamil* v. *Musammat Imtiaz Fatima*,[34] and on limitation to Rustomji's Law of Limitation, 4th ed., pp. 13–16 and 18. Here one cannot give judgment on an action which was statute-barred at the date of the amendment. It is common ground that there was a partnership during the interregnum period as there was before the first lease.

July 16. The judgment of their Lordships was delivered by Lord Tucker, who stated the facts and statutory provisions set out above and continued: If the respondent is entitled to an account for the interregnum period and if her claim is not barred by the Limitation Act the basis upon which the Chief Justice ordered the account to be taken has never been challenged by either party and their Lordships see no reason for rejecting the decision of the judge that the proper basis was that of a partnership subsisting from April 1, 1949, to July 1, 1949.

As to the first lease, which was registered, their Lordships

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[26] L.R. 44 I.A. 65.
[27] (1880) I.L.R. 6 Cal. 94.
[28] (1881) I.L.R. 3 All. 600.
[29] (1881) I.L.R. 6 Bom. 75.
[30] (1884) I.L.R. 9 Bom. 320.
[31] L.R. 44 I.A. 65.
[32] (1949) A.I.R.(E.Punj.) 222.
[33] (1933) 64 Mad.L.J. 735.
[34] (1909) L.R. 36 I.A. 210; 14 C.W.N. 59.

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feel no doubt that the sum payable thereunder, although called a royalty and calculated on a royalty basis, was a sum which was at all times readily and easily ascertainable by calculation and amounted in law to a rent. The Court of Appeal so treated it.

The questions therefore now remaining to be dealt with are two in number: 1. Was the Court of Appeal entitled to entertain an appeal against the decision of Mahon J. on the Limitation Act issue? 2. If so, what is the proper period of limitation applicable to (*a*) the claim for an account of rent payable under the registered lease dated March 26, 1946, for the period April 1, 1946, to March 31, 1949; and (*b*) the claim for an account of the respondent's share of profits on a partnership basis for the period April 1, 1949, to July 1, 1949?

Their Lordships do not agree with the decision of the Court of Appeal that the grounds of appeal seeking to attack Mahon J.'s decision on the limitation issue were incompetent. They prefer the decision of the Full Bench Court in Bombay in the case of *Chanmalswami* v. *Gangadharappa*,[1] which overruled the case of *Sidhanath Dhonddev* v. *Ganesh Govind*[2] in which it had been held that decisions as to misjoinder, limitation and jurisdiction were preliminary decrees from which the unsuccessful parties must at once appeal by reason of section 97 of the Code.

There is, however, another reason why their Lordships are of opinion that the Court of Appeal should have dealt with the issue of limitation, viz., that section 3 of the Indian Limitation Act, 1908, in terms requires the dismissal of every suit instituted after the prescribed period of limitation even though this defence is not pleaded.

In the case of *Muhammad Kamil* v. *Musammat Imtiaz Fatima*[3] on appeal to this Board, where a plea under section 4 of the Limitation Act, 1877 (which corresponds with section 3 of the Act of 1908) had been abandoned by counsel at one stage in the courts below, Lord Macnaghten observed[4] during the course of argument "the abandonment would not relieve the court from "taking notice of it," and the Board in its judgment said: "As "to this question of limitation, their Lordships are of opinion that "it was properly dealt with in the courts below."

In the present case their Lordships are of opinion that no procedural defect could relieve the Court of Appeal of its duty to give effect to the statute on an appeal from a judgment given in favour of a plaintiff in respect of a time-barred cause of action.

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[1] (1914) I.L.R. 39 Bom. 339.

[2] (1912) I.L.R. 37 Bom. 60.

[3] (1909) 14 C.W.N. 59.

[4] Ibid. 63.

It is necessary, therefore, to consider whether on the basis upon which judgment was entered for the respondent at the trial her claim was in whole or in part time-barred.

It was contended by the appellants that the amended plaint disclosed a new cause of action and that for the purposes of the Limitation Act time should be calculated from this date, i.e., July 27, 1954. Their Lordships, having compared the original plaint with the amendment, are satisfied that the latter discloses no new cause of action, but in any event, the amendment having been made by consent and approved by the court without the imposition of any condition with regard to limitation, it follows that time must be calculated from the date of the original plaint, i.e., July 23, 1952.

As regards the claim for rent, the relevant period of limitation depends on whether the claim for payment under this lease, which was a contract in writing registered, falls within article 116 of the first schedule, under which the period is six years, or article 110, under which it is three years.

This question was settled by a Board of the Judicial Committee consisting of Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins in 1916 in the case of *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur.*[5] In a judgment delivered by Lord Sumner it was held that a claim for rent under a registered lease came within article 116. In view of the unqualified words " arrears of rent " in article 110 and the use of the word " compensation " in article 116 it is perhaps desirable to set out at some length the passage in the judgment dealing with this matter.

After referring to the history of the limitation legislation culminating in the Acts of 1871 and 1877 the judgment proceeded [6]: " Both these Acts draw, as the Act of 1859 had drawn, " a broad distinction between unregistered and registered instru- " ments much to the advantage of the latter. The question " eventually arose whether a suit for rent on a registered contract " in writing came under the longer or the shorter period. On one " hand it has been contended that the provision as to rent is plain " and unambiguous and ought to be applied, and that in any case " ' compensation for the breach of a contract ' points rather to a " claim for unliquidated damages than to a claim for payment

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[5] (1915) L.R. 44 I.A. 65; I.L.R. 44 Cal.(P.C.) 759.

[6] L.R. 44 I.A. 69.

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"of a sum certain. On the other it has been pointed out "that 'compensation' is used in the Indian Contract Act in "a very wide sense, and that the omission from article 116 of "the words, which occur in article 115, 'and not herein specially "'provided for' is critical. Article 116 is such a special provision, and is not limited, and therefore, especially in view of "the distinction long established by these Acts in favour of registered instruments, it must prevail. There is a series of Indian "decisions on the point, several of them in suits for rent, though "most of them are in suits on bonds. They begin in 1880, and "are to be found in all the Indian High Courts. In spite of some "doubts once only was it held, in 1903 [*Ram Narain* v. *Kamta* "*Singh* [7]], that in such a suit article 110 and not article 116 "applied. Then in 1908, and in this state of the decisions, Act "IX of 1908 replaced the Limitation Act of 1877 without altering "the language or arrangement of the articles, and in 1913 in "*Lalchand* v. *Narayan* [8] the High Court of Bombay held that, "especially in view of this re-enactment, the current of decisions "must be followed, and *Ram Narain's* case [9] must be disapproved. "In the present case the High Court treated the matter as settled "law in the same sense. . . .

"However arguable the construction of Act XV of 1877 may "have been when the matter was one of first impression, it "certainly cannot be said that the construction, for which the "appellant argues, was ever clearly right. On the contrary, their "Lordships accept the interpretation so often and so long put "upon the statute by the courts in India, and think that the "decisions cannot now be disturbed."

This decision was given in 1916, three years before the Indian Limitation Act was applied to Tanganyika. It was binding on the Indian Courts and settled once and for all a matter with regard to which there had been some conflict of opinion. Their Lordships do not consider it would be proper at this date to refuse to follow a decision of this Board given in such circumstances, which must have been recognized as valid and binding when the Indian Limitation Act, 1908, was made applicable to Tanganyika.

They accordingly hold that article 116 is applicable to the claim under the lease and that the relevant period of limitation is six years. Counsel for the appellants drew their Lordships' attention to the fact that the decree of October 17, 1955, ordered an account to be taken of all sisal produced during the period covered by the first lease, namely, from April 1, 1946, to March 31, 1949, and of the rent by way of royalty due to the respondent on such total production whereas the period of six years calculated from July 23, 1952, would go back to July 23, 1946, and any money payable between April 1, 1946, and July 23, 1946, would be time-barred. Their Lordships are of opinion that the taking of an account covering the whole period of the lease was properly ordered, but they would point out that after the account has been taken the appellants should not be ordered to pay any sums received by the deceased in respect of sales of sisal made more than 30 days prior to July 23, 1946, or any sums received by him on sales of machinery or other movables before that date.

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[7] (1903) I.L.R. 26 All. 138.

[8] (1913) I.L.R. 37 Bom. 656.

[9] I.L.R. 26 All. 138.

With regard to the claim in respect of the interregnum period (April 1, 1949, to July 1, 1949) their Lordships have already signified their acceptance of the basis upon which the account was ordered by the Chief Justice. That basis has never been challenged by the respondent and the appellants are entitled to say that it is the only basis upon which this part of the claim can be dealt with. It follows, therefore, that as to this period the claim is time-barred under section 106 of the Indian Limitation Act, 1908, and the appellants are entitled to the necessary consequential amendment of the decree drawn up pursuant to the judgment of the Chief Justice.

Their Lordships will accordingly humbly advise Her Majesty that the appeal be allowed to the extent that the order of the Court of Appeal for Eastern Africa dated July 18, 1956, be set aside and the decree of the High Court of Tanganyika dated October 17, 1955, be varied by striking out paragraph (2) thereof. The appellants, although successful only with regard to a small part of the period covered by the claim, have had to appeal to the Court of Appeal for Eastern Africa and thence to this Board in order to secure the appropriate variation of the order made against them and are consequently entitled to some measure of relief in respect of costs, which in all the circumstances their Lordships consider will be met by ordering that the respondent do pay one quarter of the appellants' costs in the Court of Appeal for Eastern Africa and of this appeal.

Solicitors: *Theodore Goddard & Co.*

C. C.

[HOUSE OF LORDS.]

H. L. (E.)*

1957
Oct. 2, 3,
7, 8;
Nov. 25.

CANADIAN PACIFIC STEAMSHIPS LTD. . APPELLANTS;

AND

BRYERS . . . . RESPONDENT.

Dock — Regulations — Shipbuilding — Dry dock — Several repairers contracting with shipowners — No notional occupier — Accident to shipowners' employee — Liability of shipowners — Shipbuilding Regulations, 1931 (*S.R. & O.*, 1931, *No.* 133), "*Duties,*" *reg.* 10.

Factory — Persons benefited by regulations — "Persons employed" — Seaman employed as yeoman carpenter by shipowners — Work of repair on ship in public dry dock—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 79 — *Shipbuilding Regulations,* 1931 (*S.R. & O.*, 1931, *No.* 133), *reg.* 10—*Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 60 (*as amended by Factories Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 55), *s.* 12).

Statute—Construction—Proviso—Exceptions.

The Shipbuilding Regulations, 1931, provide: "Duties: It "shall be the duty of the occupier to comply with Parts I to VIII "of these regulations. Provided that, when a ship is being repaired "in public dry dock, the person who contracts with the owner of the "ship or with his agent to execute the work of repair, shall be "deemed to be the occupier for the purposes of Parts I to VIII and "it shall be his duty to comply with the said parts, except as "follows:—. . . (*b*) Where the control of the ship apart from the "work of repair remains with the shipowner, it shall be the duty "of the shipowner, master, or officer in charge, to provide the "protection specified in regulation 10 in so far as concerns those "hatches or openings which are not required to be used for the "purposes of the repairs, but if such protection be removed by any "person or persons in the employment of the occupier or at his or "their request, the occupier shall be responsible for its replacement "as soon as practicable."

Reg. 10: "All openings in decks and tank tops shall be securely "protected. Such protection shall be maintained in position and "when necessarily removed in the course of work shall be replaced "as soon as practicable. . . ."

An able seaman employed by the owners of a ship which was undergoing overhauling and repair in a public dry dock sustained injuries when, in the ordinary course of his work, he fell into an opening in a deck which had been left uncovered. It was not a part of the ship affected by the repairs. At the time a number of contractors were under direct contract with the shipowners to make specialist repairs. The seaman sued the shipowners, claiming

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* *Present:* VISCOUNT KILMUIR L.C., VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD TUCKER and LORD KEITH OF AVONHOLM.

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damages on the ground, inter alia, of breach of regulation 10 of the Shipbuilding Regulations, 1931:—

Held, (1) (Lord Keith dubitante) that, on the true construction of the part of the regulations headed "duties," although no one was deemed to be the occupier under the proviso, the shipowners were at the material time under a duty to observe regulation 10, since the ship was being repaired in public dry dock and exception (*b*) in the section of the regulations headed "duties" applied.

Wilkinson v. *Rea Ltd.* [1941] 1 K.B. 688; [1941] 2 All E.R. 50 applied.

Donovan v. *Cammell Laird & Co.* [1949] 2 All E.R. 82 not followed.

(2) That the seaman was a person entitled to sue for injury sustained by him through a breach of the regulations since they enured for his benefit as well as for that of the persons engaged on the repairing process.

The Shipbuilding Regulations, 1931, made under section 79 of the Factory and Workshop Act, 1901, are now deemed to have been made under section 60 of the Factories Act, 1937, as amended by section 12 of the Factories Act, 1948, and have not been varied to bring them into conformity with the Act of 1937, and section 79 and the regulations alone fell to be construed in order to decide for whose benefit regulation 10 was made. Section 79 empowered the Secretary of State generally to make regulations in respect of and affecting persons employed in the factory or premises, though not employed in the processes thereof, and regulation 10 was presumably for the protection of persons whose employment necessitated their presence in the dangerous area on their way to or from their work or near to their work, including members of the crew, and was clearly intra vires section 60 of the Act of 1937 as amended.

Hartley v. *Mayoh & Co.* [1954] 1 Q.B. 383; [1954] 1 All E.R. 544 distinguished.

Dicta of Lord Goddard C.J. and Streatfeild J. in *Massey-Harris-Ferguson (Manufacturing) Ltd.* v. *Piper* [1956] 2 Q.B. 396, 401, 403; [1956] 2 All E.R. 722 approved.

Decision of the Court of Appeal [1957] 1 Q.B. 134; [1956] 3 All E.R. 560 affirmed.

APPEAL from the Court of Appeal (Singleton, Jenkins and Parker L.JJ.).

This was an appeal from an order of the Court of Appeal dated October 12, 1956, that the judgment of Diplock J., dated June 27, 1956, in favour of the plaintiff (the present respondent) James Bryers, for the sum of £196 13s. 3d. with costs should be affirmed, and the appeal of the defendants (the present appellants), Canadian Pacific Steamships Ltd., therefrom be dismissed.

The facts found by Diplock J. were stated by Viscount Kilmuir L.C. as follows: The respondent at all material times

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was employed as a yeoman carpenter by the present appellants (who were the original defendants) on board their ship the *Empress of Scotland.* The scuppers and bilge openings of the ship had been covered while a cargo of grain was carried on the voyage prior to the accident, and it was the respondent's task, in the ordinary course of his employment as a carpenter, to remove the covering cement from the scuppers and bilge openings. He had performed this work in most of the holds of the ship while she was lying for the purpose of discharge in a wet dock in the port of Liverpool, but at the time the respondent met with his accident the ship had been moved into a public dry dock (owned by the Mersey Docks and Harbour Board) under a contract with the board, for her annual survey and overhaul. The appellants had instructed Harland & Wolff Ltd., ship repairers, to carry out general repairs and, in addition, had instructed some 17 other contractors to execute specialist repairs upon the ship under direct contract with the appellants. On the morning of December 8, 1954, after the ship had gone into the public dry dock, the respondent's task took him to No. 5 hatchway on "F" deck, a part of the ship at which no repairs were being carried on. A ship's ladder led down from "E" deck to "F" deck and there was a well a few feet from the foot of the ladder. Another vertical ladder led from the top of the well down to the bilges. In order to get down to the bilges it was necessary to approach to the edge of the well and climb on to the ladder. The respondent had done this many times in the course of his 13 years' service at sea. As the hatch covers of "E" deck were on at the time, it was necessary for the respondent, on his way to "F" deck, to have a cover lifted so that he could climb down the ladder to "F" deck. There was no permanent lighting on "F" deck and the respondent was expecting to find a light cluster there. With the assistance of an engineer working on "E" deck the respondent lifted the cover in the vicinity of the ladder and, after borrowing the engineer's torch, went below. He walked to the edge of the well and shone the torch down to find out whether there was a light cluster on the ceiling of the well. He had no difficulty in seeing round about him on "F" deck and he did not complain of lack of light. Nevertheless, while he was near the edge of the well he slipped and fell into the well and sustained injuries. His complaint was that the well should have had stanchions and lifelines round it, which he could have gripped after slipping and so saved himself.

On these facts the trial judge found that at the material time the ship was undergoing work of repair in a public dry dock; that the control of the ship apart from the work of repair remained with the appellants as the shipowners, and that, although it was impossible to find any person who had contracted with the appellants to execute the work of repair so as to be deemed to be the occupier for the purpose of Parts I to VIII of the Shipbuilding Regulations, 1931, it was the duty of the appellants to provide the protection specified in regulation 10, in so far as the well in "F" deck was concerned; that the appellants had failed securely to cover the well and were in breach of regulation 10. He also found that the respondent was within the category of persons upon whom the regulation conferred a civil right of action in respect of a breach; that the appellants, their servants or agents, had not been guilty of negligence at common law; that the respondent had been guilty of negligence contributing to his injuries to the extent of one-half; that the respondent would have been entitled to the sum of £393 6s. 6d. if he had not been guilty of contributory negligence. On these findings the trial judge gave judgment for the respondent for £196 13s. 3d. and costs. That judgment was affirmed by the Court of Appeal.

J. S. Watson Q.C. and *John Melville Kennan* for the appellant company. The first question is whether the appellants had any duty imposed on them by the regulations at the material time, that is, whether the exceptions to the proviso in the "Duties" paragraph come into operation and apply when (as here) a ship is being repaired in public dry dock and there is no notional occupier who can be held responsible, for the purposes of the main body of Parts I to VIII of the regulations, for the duties allotted to him by the substantive part of the proviso.

On this question it is submitted that the exceptions cannot be read as substantive provisions without straining the language and rewriting the proviso. They can only be exceptions from the duty imposed by the proviso on someone who is not, but is deemed to be, the occupier and whose duty is to comply with Parts I to VIII, except in certain respects in regard to which obligations are put on other persons; if there is no person who can qualify to be an occupier, there is nothing to except. In such a case the duty to comply with the regulations is left to the actual occupier of the public dry dock (here the Mersey Docks and Harbour Board), or else no one is fixed with any of the duties under the regulations and the obligations of all concerned fall to be determined under the common law. The context of the regulations does not permit of the application of the rule of construction of the Interpretation Act, 1889, that words in the singular prima facie include the plural, to the words of the proviso, "the person who contracts with the owner of the ship or "with his agent to execute the work of repair, shall be deemed "to be the occupier." At the material time there were so many separate and independent firms of contractors working in the ship that it could not be said that there was any person who had contracted with the appellants to execute the work of repair, so as to be deemed to be the occupier for the purposes of Parts I to VIII and whose duty it was to comply with them. In the circumstances, the appellants were under no duty to comply with regulation 10.

The second question is whether the respondent was within the class of persons for whose benefit the regulations were made, that is, whether the respondent as a seaman employed about his ordinary duties in a part of the ship not concerned in the repairs, although the ship was in dry dock, is within the meaning of the expression "person employed" so as to be within the class for whose benefit the regulations were made.

On this question it is submitted that the appellants did not owe a duty to comply with the regulations to their yeoman carpenter, the respondent, while he was performing his normal duties in the ship and not carrying out any work of repair and was not even in any part of the ship where repairs were being carried out. The regulations were made in respect of the construction and repair of ships in shipbuilding yards and were intended to protect persons employed in the construction and repair of ships in such premises; they were not intended to protect persons who happened to have employment in those premises wholly unconnected with the construction and repair of ships and not even employed by any repairing contractors.

On the final question whether or not there was, in any event, a breach of regulation 10, and whether or not it caused the fall, it is not proposed to argue the point, though it is not abandoned.

Turning to the first question, the appellants adopt the general observations of Parker L.J. in the Court of Appeal in this case.[1] As a matter of construction on the ordinary meaning of words, parts of the proviso cannot come into operation unless the whole of it is effective. One cannot have an exception from something

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[1] [1957] 1 Q.B. 134, 156–157; [1956] 3 All E.R. 560.

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which never comes into operation. The two are co-related and cannot be separated: see *Smith* v. *Cammell Laird & Co. Ltd.*[2] In *Wilkinson* v. *Rea Ltd.*[3] this matter was not really considered, but, in the last resort, the appellants submit that it was wrongly decided. The question whether there is a notional occupier in such a case as this was left open by *Hartwell* v. *Grayson, Rollo and Clover Docks Ltd.*[4] *Donovan* v. *Cammell Laird & Co.*[5] has held the field until the present case and should be followed. There is no hardship on the dock authority if this duty is placed on them: see sections 136 and 137 (1) of the Factories Act, 1937. It is sufficient for the appellants to show that they are not liable and they need not show who may be liable.

To construe this regulation favourably to the respondent would involve unknitting the English of it and looking at the fragments, whereas in construing an enactment one must read any section as a whole: see *Jennings* v. *Kelly.*[6] It is not the function of the courts to fill in gaps in legislation: *Magor and St. Mellons Rural District Council* v. *Newport Corporation.*[7]

On the second question, assuming that the regulations do apply, the respondent is not within the class for whose benefit they were made. He was a seaman going about his ordinary duties and not concerned in the repairs. He was familiar with his work and was working in a familiar place which would not normally come within the regulations.

The regulations were made under section 79 of the Factory and Workshop Act, 1901, and section 82 deals with their application. Regulations made under the Act are designed to protect persons employed by the occupier of a factory or by anyone to whom he has delegated some of his functions and generally to persons engaged in the processes of manufacture, no matter by whom employed. The preamble to the Shipbuilding Regulations states that "they shall apply to the construction and repair of "ships in shipbuilding yards." The respondent was not within them, because he was not repairing a ship but doing his ordinary work as a seaman: see *Hartley* v. *Mayoh & Co.*[8] As in the case of the fireman there, this seaman was in the ship because it was incidental to his work; he was not engaged in the repairs or in the processes of a factory. See also *Stanton Ironworks Co. Ltd.* v. *Skipper* [9] and *Massey-Harris-Ferguson (Manufacturing) Ltd.* v. *Piper.*[10]

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[2] [1940] A.C. 242, 256, 261, 267–268; 56 T.L.R. 164; [1939] 4 All E.R. 381.

[3] [1941] 1 K.B. 688, 690, 692, 695, 698–699; [1941] 2 All E.R. 50.

[4] [1947] K.B. 901, 910, 911–912, 915, 917.

[5] [1949] 2 All E.R. 82.

[6] [1940] A.C. 206, 217–218, 229; 56 T.L.R. 154; [1939] 4 All E.R. 464.

[7] [1952] A.C. 189; [1951] 2 T.L.R. 935; [1951] 2 All E.R. 839.

[8] [1954] 1 Q.B. 383, 388, 390, 396; [1954] 1 All E.R. 544.

The enabling power to make the regulations now in question is found in section 79 of the Factory and Workshop Act, 1901. That Act was repealed by the Factories Act, 1937, which, however, contained a saving proviso in section 159 (1) whereby such regulations as these were to be deemed to have been made under section 60 (1) of the Act of 1937. But the rule-making power under the earlier Act is not wider than that under the later Act.

As to whether the regulations imposed on the appellants any duty to the respondent, see *Garcia* v. *Harland & Wolff Ltd.*,[11] followed in *Lovell* v. *Blundells and T. Albert Crompton & Co. Ltd.*[12] It is a matter of the construction of the regulations whether or not the respondent is covered by them. He is not. But if, in order to determine the question, it is necessary to look at the powers conferred on the Secretary of State by section 79 of the Act of 1901, again the respondent was clearly not covered by any regulations authorized by that section. See also *Wingrove* v. *Prestige & Co. Ltd.*[13] Under the new Act the regulations made under the old Act are kept in being, covering the subject-matter which they formerly covered, but it is hard to see how regulations so made and approved by Parliament can suddenly shift their position to accord with the new Act.

Indications that the regulations are looking only to employees are found in Part IX, which refers to "persons employed." See also section 13 (1) of the Factories Act, 1937, where a distinction is drawn between a "person employed" and one "working on "the premises."

One must go back to section 79 of the Act of 1901 under which only dangerous trades are being dealt with, and, accordingly, regulations are being made to protect persons whose presence is incidental to the processes being carried on.

John Melville Kennan following. The respondent was not a person who could bring an action on the ground of a breach of the regulations. These regulations superseded earlier regulations made in 1914 (S.R. & O., 1914, No. 461), which laid down duties for occupiers of shipbuilding yards and persons employed there. The scope of the new regulations was widened to include repairs in dry dock.

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[9] [1956] 1 Q.B. 255, 259; [1955] 3 All E.R. 544.

[10] [1956] 2 Q.B. 396, 401, 403; [1956] 2 All E.R. 722.

[11] [1943] K.B. 731, 737; 60 T.L.R. 16; [1943] 2 All E.R. 477.

[12] [1944] K.B. 502, 507; 60 T.L.R. 326; [1944] 2 All E.R. 53.

[13] [1954] 1 W.L.R. 524; [1954] 1 All E.R. 576.

There has been no case under these regulations where a plaintiff has succeeded who was not a person employed in the work of repairing or constructing a ship. Here the plaintiff, the respondent, was in fact doing a seaman's job which he might have been doing at any time or place. When a ship is in dry dock people of all sorts are going on board all day—solicitors, surveyors, friends visiting the crew, office staff from the owners' head office. Also a substantial part of the crew are on board. Almost invariably a ship in graving dock has a skeleton crew on board and at least one officer. If the respondent were right, a steward slipping on the way to the galley would be entitled to sue under the regulations. But that would go beyond their limited scope.

The correct approach is that the question is one of construction of the particular regulations before the court. The Act confines their construction.

If a sailor were within these regulations, the argument would apply far more strongly to invitees who are strangers to the dangers of the ship.

As to who are "persons employed," see *Taylor* v. *Ellerman's Wilson Line*.[14] If the respondent be right in the present case, Mrs. Taylor should have succeeded under the regulations in that case, because her husband was a member of a shore gang employed in painting a ship in dry dock.

A regulation categorically designed to protect a member of the ship's crew would be ultra vires section 79 of the Act of 1901. In Redgrave's Factory Acts, 14th ed., pp. 106–107, among the notes to this section there is a list of processes certified to be dangerous. When the Secretary of State so certified a process, he would be going beyond his powers if he tried to protect people who were not engaged in it: see *Mackey* v. *James Henry Monks (Preston) Ltd.*[15]

Regulations made, say, in 1914 are not amended by inference in 1937 and 1948 because Factories Acts in those years have given the Secretary of State different powers.

By contrast, where one has sections like section 26 of the

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[14] [1952] 1 Lloyd's Rep. 144.

[15] [1918] A.C. 59, 90; 34 T.L.R. 34.

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Act of 1937, dealing with safe means of access, that is wide enough to cover any factory, any person or any work.

Rose Heilbron Q.C. and *Henry Lachs* for the respondent. As to the question whether the appellants were at the material time under any duty imposed on them by the regulations, see *Harrison* v. *National Coal Board*,[16] and *Liversidge* v. *Anderson* [17] for the proper approach to the construction of the regulations.

The dock authority under proviso (*a*) of the " Duties " section of the regulations and the shipowners under proviso (*b*) are identified as being responsible for particular matters such as lighting, hatches and approaches. This control is not affected by the number of repairers on the ship. The shipowners' liability here is placed on them by express and peremptory words. Whether or not the regulations are effective in all cases, there is no gap where the shipowners are concerned. It would be wrong if owners in direct contact with repairers should be able to escape liability by increasing their numbers. The exceptions in the proviso, (*a*), (*b*) and (*c*), are in effect three general rules in which the particular application of the duties is laid down. *Donovan* v. *Cammell Laird & Co.*[18] was wrongly decided on this point, though it may be that the shipowners there were not liable in any event. By contrast reliance is placed on *Wilkinson* v. *Rea Ltd.*[19] In *Donovan's* case [20] the judge was filling in a gap in the Act, contrary to the principles stated in *Magor and St. Mellons Rural District Council* v. *Newport Corporation.*[21] He was assuming more than can be read from the proviso in question. In the Court of Appeal in the present case Parker L.J.[22] was confusing the person with the duties. He was saying in effect that unless there is a person who can be fixed with liability under the proviso, one cannot have another person who can be fixed with duties under the exemptions. Reliance is placed on *Smith* v. *Cammell Laird & Co. Ltd.*[23] The proviso and the exceptions in the " Duties " section of the regulations are not interrelated so as to depend on each other.

[VISCOUNT KILMUIR L.C. intimated that their Lordships did not require to hear further argument on the first point.]

As to the second question, namely, whether the regulations enured for the benefit of the respondent as well as for that of persons engaged in the repairing process, the preponderance of authority shows that these regulations are to be read as if they had been made under section 60 of the Factories Act, 1937, as amended by section 12 of the Factories Act, 1948. That being the enabling legislation, the benefit of the regulations has been extended to " the persons employed," and not merely to " per- " sons employed in connexion therewith " (i.e., the process in question).

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[16] [1951] A.C. 639, 650; [1951] 1 T.L.R. 1079; [1951] 1 All E.R. 1102.

[17] [1942] A.C. 206, 219; 58 T.L.R. 35; [1941] 3 All E.R. 338.

[18] [1949] 2 All E.R. 82.

[19] [1941] 1 K.B. 688, 691.

[20] [1949] 2 All E.R. 82, 86, 87.

[21] [1952] A.C. 189.

[22] [1957] 1 Q.B. 134, 155.

[23] [1940] A.C. 242, 267–268.

The relevant authorities are *Garcia* v. *Harland & Wolff Ltd.*[24]; *Lovell* v. *Blundells and T. Albert Crompton & Co. Ltd.*[25]; *Harvey* v. *Royal Mail Lines Ltd.*[26]; *Kininmonth* v. *William France Fenwick & Co. Ltd.*[27]; *Miller* v. *William Bootham & Sons Ltd.*[28]; and *Massey-Harris-Ferguson (Manufacturing) Ltd.* v. *Piper.*[29] These together support the respondent's proposition.

Both under section 79 of the Act of 1901 and section 60 of the Act of 1937 the Secretary of State may " make such regula- " tions as appear to him to be reasonably practicable and to meet " the necessity of the case." Nothing limits him to making regulations for persons employed in connexion with the particular processes. The sections are dealing with the danger to be guarded against. As to the powers of the Secretary of State, see *Mackey* v. *James Henry Monks (Preston) Ltd.*[30] Under both Acts the power of making regulations in respect of persons subject to the dangers dealt with is wide, but the scope of the later Act is different. One must look to see what class of persons came within the power to make these regulations: see *Groves* v. *Lord Wimborne.*[31] A window cleaner would be covered by the Factory Acts when working in a factory, though not when working in a private house. Similarly, there is nothing absurd in a sailor being covered by them when the ship is in dry dock and not when it is in wet dock, because he is exposed to added dangers when repairers are on board. Compare regulation 10 of the Docks Regulations, 1934, and the duties under the Lead Paint Regulations, 1927. Under the regulations now being considered, certain duties are cast on the shipowners, and their own employees must be within the scope of their protection.

Once the enabling section for the making of the regulations

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[24] [1943] K.B. 731, 738.

[25] [1944] K.B. 502, 507, 509.

[26] (1941) 65 T.L.R. 286n.

[27] (1949) 65 T.L.R. 285.

[28] [1944] K.B. 337, 340; 60 T.L.R. 218; [1944] 1 All E.R. 333.

[29] [1956] 2 K.B. 396.

[30] [1918] A.C. 59, 84.

[31] [1898] 2 Q.B. 402; 14 T.L.R. 493.

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is found, one must look at the particular regulation in question to see whether it is narrower than the enabling provision: see *Wingrove* v. *Prestige & Co. Ltd.*[32]; *Manchester Ship Canal Co.* v. *Director of Public Prosecutions*[33]; *Hawkins* v. *Thames Stevedore Co. Ltd.*[34] (which it is not sought to uphold); *Howlett* v. *Shaw Savill and Albion Co. Ltd.*[35]; *Harvey* v. *Royal Mail Lines Ltd.*[36]; *Kininmonth* v. *William France Fenwick & Co. Ltd.*[37]; *Massey-Harris-Ferguson (Manufacturing) Ltd.* v. *Piper*[38]; *Mulready* v. *J. H. & W. Bell Ltd.*[39] and *Taylor* v. *Ellerman's Wilson Line*,[40] cited for the appellant, which was decided on a wrong principle.

The regulations cast obligations not only on occupiers but on other employers of other sets of workmen. For the carrying into effect of these obligations the regulations must have envisaged that the carrying out of the duties would devolve on their employees. At any rate since the Act of 1948 all the employees must have been considered as covered by the protection of the regulations.

Ward v. *Coltness Iron Co. Ltd.*[41] supports the view that the expression "person employed" covers a seaman engaged by the shipowners to do work on a ship which is also a factory.

J. S. Watson Q.C. in reply. Section 106 (2) of the Factories Act, 1937, supports the appellants' contentions. It indicates that, in wet dock at any rate, similar work done by a seaman would not be covered. It is not covered in dry dock either.

The proviso in the regulations must be read as a whole and not piecemeal. Parker L.J. was right in the Court of Appeal in saying that there was nothing to except.[42] On this point the correct view was also stated in *Hartwell's* case[43] and *Donovan's* case.[44]

As to the second point, this depends on the three enabling sections, section 79 of the Act of 1901, section 60 (1) of the Act of 1937 and section 12 of the Act of 1948. Section 79 enabled regulations to be made for the protection of persons engaged in processes which Parliament thought to be fraught with special dangers. Section 60, intended to be a re-enactment of section

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[32] [1954] 1 W.L.R. 524.

[33] [1930] 1 K.B. 547, 553; 46 T.L.R. 163.

[34] [1936] 2 All E.R. 472.

[35] (1924) 40 T.L.R. 778.

[36] 65 T.L.R. 286n.

[37] 65 T.L.R. 285.

[38] [1956] 2 K.B. 396, 401.

[39] [1953] 2 Q.B. 117; [1953] 2 All E.R. 215.

[40] [1952] 1 Lloyd's Rep. 144.

[41] 1944 S.C. 318.

[42] [1957] 1 Q.B. 134, 156.

[43] [1947] K.B. 901.

[44] [1949] 2 All E.R. 82.

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79, inadvertently seemed to narrow it by including the words "in connexion therewith." Section 12 restored the position. *O'Brien* v. *Enrico Arbib & Co.*[45] indicates that in Scotland the view was held that the regulations applied to persons loading and unloading a ship and to no one else.

In general, as to the effect of new enabling sections on existing regulations, legislation is not retrospective unless it is so expressed.

Their Lordships took time for consideration.

November 25. Viscount Kilmuir L.C. stated the facts and continued: My Lords, the relevant parts of the Shipbuilding Regulations, in my opinion, are:

A. The heading:

"In pursuance of section 79 of the Factory and Workshop "Act, 1901, I hereby make the following regulations and direct "that they shall apply to the construction and repair of ships in "shipbuilding yards."

B.

"Duties

"It shall be the duty of the occupier to comply with Parts I "to VIII of these regulations.

"Provided that, when a ship is being repaired in public dry "dock, the person who contracts with the owner of the ship or "with his agent to execute the work of repair, shall be deemed "to be the occupier for the purposes of Parts I to VIII and it "shall be his duty to comply with the said parts, except as "follows:—

"(*a*) It shall be the duty of the person having the general "management or control of the public dry dock to comply with "regulations 2 (*b*) and (*c*) and 11 (*c*) so far as they concern those "gangways, uprights, thwarts and planks provided at the dock "by such person; with regulation 42 (*b*) so far as it concerns the "lighting of the quay round the dock; and with regulation 46.

"(*b*) Where the control of the ship apart from the work of "repair remains with the shipowner, it shall be the duty of the "shipowner, master, or officer in charge, to provide the protection "specified in regulation 10 in so far as concerns those hatches "or openings which are not required to be used for the purposes

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[45] 1907 S.C. 975, 979, 981–982.

"of the repairs, but if such protection be removed by any person "or persons in the employment of the occupier or at his or their "request, the occupier shall be responsible for its replacement as "soon as practicable.

"(c) Where the shipowner provides the lighting on board the "ship it shall be the duty of the shipowner, master, or officer in "charge, to comply with regulation 42 (b) so far as regards the "lighting on the ship which he has undertaken to provide.

"It shall be the duty of all persons employed to comply with Part IX of these regulations."

The appellants appealed, and in the Court of Appeal made two submissions which are relevant to the problem now before this House, namely: A. That, upon the true construction of the part of the regulations headed "Duties" considered in relation to the circumstances of the present case, the appellants were not at the material time under any duty to observe regulation 10. B. That the respondent was not a person who was entitled to sue for injury sustained by him by reason of a breach of these regulations.

On the first point Singleton and Jenkins L.JJ. held that the only condition to be satisfied in order to bring into operation the proviso and the exceptions contained in the section of the Shipbuilding Regulations, 1931, headed "Duties" was that the ship should be undergoing repair in a public dry dock; that the exceptions (a), (b) and (c) were in terms substantive provisions, each enjoining compliance with some specified regulation or regulations; and that, as the ship was undergoing repair in a public dry dock, exception (b) applied, and the appellants were under a duty to provide the protection specified in regulation 10.

The whole court held that they were bound on this point by the decision of the Court of Appeal in *Wilkinson* v. *Rea Ltd.*,[1] in which this point was not argued. Parker L.J. indicated that, apart from this authority, he would have accepted the argument now advanced by the appellants. He thought that, read literally, the exceptions are, and could only be, exceptions from the duty imposed by the preceding words on someone who is not, but is deemed to be, the occupier of the premises, and that if, as in the present case, there was no such person, there was nothing to except.

On the second submission, the court unanimously held that the Shipbuilding Regulations, 1931, were intended to protect the people working within the factory: that the public dry dock constituted the factory at the material time, and that the respondent, being employed within the factory in his normal and regular work, came within the category of persons for whose protection the regulations were intended.

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[1] [1941] 1 K.B. 688; [1941] 2 All E.R. 50.

As a result, the appellants' appeal was dismissed (as was a cross-appeal on which I need say nothing further). The Court of Appeal refused to grant leave to appeal to this House but the appellants petitioned the House for such leave, which was granted.

At your Lordships' Bar counsel for the appellants made the same two submissions as in the Court of Appeal. I have endeavoured to summarize these above, and I now proceed to deal with them in order.

With regard to the first submission, I have tried to give full weight to the reasons on account of which it found favour with Parker L.J. in the present case, and Devlin J. in the case of *Donovan* v. *Cammell Laird & Co.*[2] I have also had in mind that, although these regulations are made with the purpose of ensuring the safety of workpeople in dangerous employments, they carry a penal sanction, and that a criminal offence requires clear words for its establishment. Nevertheless, I am left in no doubt as to my view.

In the first place, I think that it has been sought to read too much into the words "except as follows." I take the view which was raised during the argument that they are really equivalent to "but."

Secondly, I find nothing in the context of paragraphs (*a*), (*b*) and (*c*) which makes the substitution of a notional occupier essential to their being in force. They show a thoroughly practical and sound allocation of duties between those in control of the dock and those in control of various parts of the ship, whoever be the occupier.

Thirdly, I am of opinion that the only condition precedent for their coming into force is that contained in the words "when a "ship is being repaired in public dry dock." I note that in his judgment in *Donovan's* case,[2] Devlin J. undoubtedly reasoned from this starting point. Thereafter, however, if I may say so with the greatest respect, he proceeded to construe on the basis of the state of affairs which he thought the draftsman must have contemplated. Thence he proceeds to create further conditions precedent, and finally, though with some doubt, comes to the view that the regulations do not apply to the shipowner where there is no notional occupier. In my opinion, such reasoning is, to use words often canvassed in argument before us, "supplying "a gap" while the reasoning of Diplock J. and the majority of the Court of Appeal does not involve so doing. Moreover, it does not seem to me a compelling factor that paragraph (*b*) provides for a division of duties between the shipowner and the repairer, who is a notional occupier. It seems obviously reasonable to make the latter, should he exist, provide for the safety of the openings used in the course of the repairs.

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[2] [1949] 2 All E.R. 82.

In support of their second submission, the appellants argued that the Shipbuilding Regulations, 1931, were made in respect of the construction and repair of ships in shipbuilding yards, and were designed and intended to protect persons employed in such construction and repair in such premises, and were not designed or intended to protect persons who happened to have employment wholly unconnected with the construction or repair of ships, and who are not even employed by any repairing contractors. In other words, they raise the question whether the duty is owed only to persons employed in the processes or also (at least) to persons ordinarily employed in the notional factory which the regulations envisage.

Before I consider certain statutory provisions I note that the powers and duties of the Secretary of State have been transferred since 1941 to the Minister of Labour.

As the heading states, these regulations were made in pursuance of section 79 of the Factory and Workshop Act, 1901, which reads: "Where the Secretary of State is satisfied that "any manufacture, machinery, plant, process or description of "manual labour, used in factories or workshops, is dangerous or "injurious to health or dangerous to life or limb, either generally "or in the case of women, children or any other class of persons, "he may certify that manufacture, machinery, plant, process or "description of manual labour to be dangerous; and thereupon "the Secretary of State may, subject to the provisions of this "Act, make such regulations as appear to him to be reasonably "practicable and to meet the necessity of the case."

That Act was repealed by the Factories Act, 1937, which, however, contained the following saving proviso to section 159 (1): "Provided that any . . . regulation . . . made or certificate . . . given under any enactment repealed by this Act "which is in force at the commencement of this Act shall "continue in force and shall have effect as though it had been "made or given under this Act, and, in so far as it could have "been made or given under a particular provision of this Act, "shall be deemed to have been made or given under that "provision, and any such order or regulation made by the "Secretary of State under a power which is exercisable under a "corresponding provision of this Act by a different class of "instrument, shall be deemed to be an instrument of that class, "so, however, that any order or regulation of the Secretary of "State which continues in force by virtue of this proviso may, "in so far as it may be necessary to bring it into conformity "with this Act, be varied or revoked by an order made by him "under this Act."

The regulations before us are therefore, by the foregoing proviso, deemed to have been made under section 60 (1) of the Act of 1937, which originally read: "(1) Where the Secretary "of State is satisfied that any manufacture, machinery, plant, "process, or description of manual labour, used in factories is "of such a nature as to cause risk of bodily injury to persons "employed in connexion therewith, or any class of those persons, "he may, subject to the provisions of this Act, make such "special regulations as appear to him to be reasonably practicable "and to meet the necessity of the case."

By section 12 of the Factories Act, 1948, the words "the "persons employed" were substituted for "persons employed in "connexion therewith," while section 15 (2) provided: "Any "reference in the principal Act [i.e., the Act of 1937] or this "Act to a provision of that Act which is amended by this Act "shall be construed as a reference to that provision as so "amended."

It is therefore clear that the Shipbuilding Regulations of 1931 are now deemed to have been made under section 60 of the Factories Act, 1937, as amended by section 12 of the Act of 1948, and have not been varied to bring them into conformity with the Act of 1937 by a subsequent order made under section 159.

I accept and adopt the two basic principles formulated by the editors of Redgrave's Factories, Truck and Shop Acts, 19th ed., p. 562n, namely: "(i) Regulations cannot lawfully be made in "favour of persons outside the class of persons for whose "benefit Parliament authorized the making of the Regulations. "(ii) if the Regulations themselves define the class of persons "benefited, then the regulations cannot benefit persons outside "that class even though they may fall within a wider class in

" favour of whom the Secretary of State had the authority of " Parliament to make the Regulations."

It is an arguable point (in regard to which the trend of decisions in the courts is not without interest) that regulations protecting eo nomine persons employed in the factory but not in the processes might be intra vires section 79 of the Act of 1901, but ultra vires section 60 of the Act of 1937 in its original form. In my view, they would clearly be intra vires that section as amended in 1948. If one were in doubt as to the construction of a regulation, it might be legitimate to lean to an interpretation which made the regulation intra vires, ut magis valeat quam pereat. That is a very different thing from saying that the construction of a regulation can change automatically by reason of an extension in the vires of the enabling Act—especially when the extended enabling section contains a power to make the change by further subsidiary legislation. In other words, if it were ultra vires section 79 to make regulations for persons employed in the factory but not in the processes, that might have some relevance to the construction of regulations made under that section. On the other hand, if after taking into account all legitimate factors, one comes to the conclusion that, on their true construction, the regulations are confined to those employed in the processes, section 60 as amended in 1948 cannot automatically change their interpretation into something wider.

I therefore look first at the powers of the Secretary of State under section 79 of the Act of 1901 and then at the construction of the regulations.

In my opinion, it was not beyond the powers given to the Secretary of State by section 79 of the Factory and Workshop Act, 1901, to make regulations which enured for the benefit of persons employed in the factory, even if they were not employed in the process which caused the danger or injury to health or the danger to life and limb and thus brought about the certificate. It is obvious, without quoting examples, that such a process unless regulated (and the same applies to manufacture, machinery and plant) might be dangerous to others whose ordinary work in the factory brings them into regular proximity to the danger.

We were referred to the case of *Mackey* v. *James Henry Monks (Preston) Ltd.*[3] In that case the question for decision was, in the words of Lord Wrenbury (who dissented)[4]: "Does " the Act give the Secretary of State jurisdiction to make a

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[3] [1918] A.C. 59; 34 T.L.R. 34.

[4] [1918] A.C. 59, 99.

" regulation binding upon a person who is neither owner of the " factory nor occupier of the factory, nor employed in the factory, " a person who, in fact, has nothing to do with the factory and " is not carrying on the manufacturing process? " The majority of this House said that he had jurisdiction. They were considering on whom the duty could be laid. Nevertheless, it is interesting to note that the majority emphasize that what " meets the necessity of the case " in section 79 is a matter for the Minister (see *per* Lord Atkinson [5] and *per* Lord Parker [6]), that the powers conferred on the Secretary of State are in terms of the widest possible description,[7] and that the power to make regulations is given because the Act does not deal with each dangerous trade (*per* Lord Finlay [8]). Lord Finlay mentions section 82, which states that the regulations may apply to all or any specified class of the factories in which the process, etc., is used.

Moreover, I refer to, without quoting, the variety of words used to describe the persons for whose benefit the various regulations purport to be made. These are set out in the judgment of Jenkins L.J. and some extend to persons other than those employed in the processes. It will be noted that the Aerated Water Regulations made in 1921 under section 79 apply to persons " employed in the works."

In my opinion, it would require express words to prevent the Minister from making regulations in favour of all persons employed in the factory. I see the difficulty of defining where you are to stop. If one goes outside those employed in the processes, why should one not include the casual visitor whose own work brings him there? To this the answer is that we are now considering a man who is ordinarily and regularly employed in the ship which was part of the factory, and in such a case there is, in my opinion, no doubt of the vires of section 79.

This is not, of course, sufficient in itself to answer the question. One must now look at the construction of the regulations and the circumstances of the case. Regulation 10 itself is perfectly general. In the context of these regulations a ship being repaired in a public dry dock is part of the notional factory. The very paragraph discussed in the first part of this case shows that the incidence of the duty shifts between repairer and shipowner according to who is controlling and using part of the ship.

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[5] [1918] A.C. 59, 81.
[6] Ibid. 85.
[7] Ibid. 81–82, 84.
[8] Ibid. 73.

Therefore the presence of some part of the crew is envisaged. I can find nothing in Part IX—the "Duties of Persons "Employed"—inconsistent with the view that "persons "employed" may include the crew. One circumstance of the case that appeals to me is that both the workmen employed by the repairers and the crew will be working together in a ship exposed to all the changes and dangers which the repairing process entails. Apart from authority, I would be of opinion that the regulations enure for the benefit of a member of the crew. I have tried to give full weight to the practical disadvantages of this view so forcibly urged by Mr. Melville Kennan, but I do not think these sufficient to displace my opinion.

I now come to consider the authorities. The question has been considered in relation to different sets of regulations and the result appears to be this. Before 1937 in *O'Brien* v. *Enrico Arbib & Co.*[9] the Court of Session had taken the view that the Docks Regulations did not protect a workman who was not employed in the processes. After an amendment of the regulations, Lord Hewart (obiter) in *Manchester Ship Canal Co.* v. *Director of Public Prosecutions*[10] and Atkinson J. in *Hawkins* v. *Thames Stevedore Co. Ltd.*[11] took the contrary view. Then, after 1937, in *Harvey* v. *Royal Mail Lines Ltd.*[12] Hallett J., and in *Kininmonth* v. *William France Fenwick & Co. Ltd.*[13] Hilbery J. took the same view as that taken by the Court of Session. I do not say any more about these cases in view of the wording of the Docks Regulations, where "person employed" is defined as a "person employed on the processes." The question then arose in relation to the Electricity (Factories Acts) Regulations, 1908, in *Hartley* v. *Mayoh & Co.*,[14] where a fireman coming on premises which were on fire did not come within the class of persons employed for whose benefit the regulation was enacted. In *Wingrove* v. *Prestige & Co. Ltd.*[15] it was held that a clerk of the works employed upon a building site by the owners of the site was not entitled to a cause of action as a result of a breach of regulation 5 of the Building Regulations. I think, however, that Diplock J. is right in saying that the ratio decidendi was that the clerk of the works would have fallen within the protection of the regulations but for the construction of the

[9] 1907 S.C. 975.

[10] [1930] 1 K.B. 547; 46 T.L.R. 163.

[11] [1936] 2 All E.R. 472.

[12] (1941) 65 T.L.R. 286n.

[13] (1949) 65 T.L.R. 285.

[14] [1954] 1 Q.B. 383; [1954] 1 All E.R. 375.

[15] [1954] 1 W.L.R. 524; [1954] 1 All E.R. 576.

particular regulation relied upon which, it was held, plainly applied only to the persons employed by the building contractors. It is true that in *Stanton Ironworks Co. Ltd.* v. *Skipper*[16] there are some dicta of Ormerod J. (as he then was) which imply that *Hartley's* case[17] is of very wide application. The *Stanton* case[18] was considered in *Massey-Harris-Ferguson (Manufacturing) Ltd.* v. *Piper.*[19] It is true that both of those cases were criminal prosecutions, but I agree with the way in which both *Hartley's* case[20] and the *Stanton* case[21] are there dealt with, and I also respectfully agree with the Lord Chief Justice when he said[22]: " . . . *Hartley* v. *Mayoh & Co.*,[23] in which it was held that a " fireman employed by the local authority which maintained the " fire brigade, who was called in in an emergency to a fire at a " factory, was not one of the ' persons employed ' within section " 60 of the Act of 1937. One can understand that; he was a man " who always has to be exposed to special dangers, and he was " called in to deal with a particular emergency. He was not " employed in the factory. He had gone there to quell a fire. He " was no more employed in the factory than a police constable, " who might be called in to quell a disturbance at the factory " or arrest a thief . . . " and later[24]: " I do not think that the " decision in *Hartley* v. *Mayoh & Co.*[25] can have had anything " like so wide an effect as has been contended for, and, as it " seems Ormerod J. thought it had." I am similarly in agreement with Streatfeild J. when he says[26]: " I have come to the " conclusion that they [the regulations] clearly apply to any " person who is employed in the factory whether the direct " servant of the occupier or a servant of an independent con" tractor so long as he is employed upon work in that factory, " as the dead man was here."

In the words of Parker L.J. in the present case[27]: " I see no " reason for inserting the further limitation that it must be a " person employed in the processes."

I think that the considerations of general safety, which are, if I may say so, powerfully stated in the last paragraph of the judgment of Streatfeild J., from which I have already quoted, are most relevant to the problem under our consideration.

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[16] [1956] 1 Q.B. 255; [1955] 3 All E.R. 544.

[17] [1954] 1 Q.B. 383.

[18] [1956] 1 Q.B. 255.

[19] [1956] 2 Q.B. 396; [1956] 2 All E.R. 722.

[20] [1954] 1 Q.B. 383.

[21] [1956] 1 Q.B. 255.

[22] [1956] 2 Q.B. 396, 401.

[23] [1954] 1 Q.B. 383.

[24] [1956] 2 Q.B. 396, 403.

[25] [1954] 1 Q.B. 383.

[26] [1956] 2 Q.B. 396, 403.

[27] [1957] 1 Q.B. 134, 158; [1956] 3 All E.R. 560.

I would dismiss the appeal.

My noble and learned friend, Lord Morton of Henryton, who is unable to be present this morning, has intimated to me that he agrees with the motion which I propose.

VISCOUNT SIMONDS. My Lords, I have had the privilege of reading the opinion which my noble and learned friend on the Woolsack has just delivered, and also that of my noble and learned friend, Lord Tucker, which is about to be delivered, and I so fully agree with them that I propose to do no more than say that I concur in the motion that this appeal should be dismissed.

LORD TUCKER. My Lords, I understand that all your Lordships are of opinion that Diplock J. and the Court of Appeal came to a correct decision on the first question at issue in the present appeal, viz., that the appellants were under a duty to comply with regulation 10 in Part I of the Shipbuilding Regulations, 1931, made under section 78 of the Factory and Workshop Act, 1901, and that on the facts found by the trial judge they were in breach thereof. I am of the same opinion and do not feel I can usefully add anything on this part of the case.

The second question is whether the respondent, who suffered injuries by reason of the breach, is within the class of persons for whose benefit the regulation was made and as such entitled to damages. He was a yeoman carpenter and member of the crew of a vessel undergoing repairs in a dry dock and in the employ of the appellants, the owners of the vessel. He was injured in consequence of the failure of the appellants to protect an opening on one of the decks down which he fell on his way to perform one of his ordinary duties as a member of the crew unconnected with the work of repair which was being carried out by a number of contractors on the ship. All the members of the courts below have held him entitled to recover damages for the injuries he suffered as a result of the appellants' breach of their statutory obligation under regulation 10, but it is contended on behalf of the appellants that only persons actually engaged in the work of repair are entitled to the benefit of this regulation.

All three members of the Court of Appeal (Singleton, Jenkins and Parker L.JJ.) were of opinion that the relevant enabling section was section 79 of the Factory and Workshop Act, 1901, and that this section and the regulations themselves alone fell to be construed in order to decide for whose benefit this regulation was made. I agree, and accordingly ignore for this purpose the Acts of 1937 and 1948, which cannot, I think, be relied upon for the purpose of giving a wider meaning to the regulation than that which it bore when it was made in 1931. Section 79 reads as follows:

[His Lordship read the section and continued:] In February, 1931, the Secretary of State made the Shipbuilding Regulations (S.R. & O., 1931, No. 133) under this section and directed that they should apply to the construction and repair of ships in shipbuilding yards, which are defined in the Act of 1901 as "any "premises in which any ships, boats or vessels used in naviga- "tion are made, finished or repaired." In the regulations "public dry dock" is defined as "any dry dock which is "available for hire." The ship in question was being repaired in a public dry dock and accordingly the provisions of paragraph (*b*) of the regulations under the heading "Duties" became applicable.

[His Lordship read paragraph (*b*) and continued:] Regulation 10 provides: "All openings in decks and tank tops shall be "securely protected. . . ."

Dealing with this part of the case Singleton L.J. said[28]: "Under that power the regulations of 1931 were made. They are "general in their terms. Mr. Watson submits that they should "not apply to a man upon a ship employed by the shipowners. I "fail to see why they should not be applied in such a case. It "may be that in some cases the shipowner (as I have said in this "case) is liable, and I cannot see why he should not be responsible "for the protection of his own men working on a ship as for any- "one else's men; nor do I see why, if there is a breach of one of "these regulations which breach leads to injury to a man, the "man on the ship should not have an action in respect of it for "breach of that regulation—which, as I think, was intended "for the protection of people working within the 'factory.'" Jenkins L.J. considered the question had to be determined on the construction of the particular regulation and that it would be idle to attempt to lay down any general rule. He referred to several sets of regulations, in some of which there is a definition of "person employed" limiting the meaning to persons employed in the particular process or manufacture in contrast to other cases where the expression used is "person employed in the works."

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[28] [1957] 1 Q.B. 134, 148.

He proceeded [29]: "In the present instance . . . the relevant "enabling section is section 79 of the Factory and Workshop "Act, 1901. That enabled protective regulations to be made in "the widest possible terms without any reference to 'persons "'employed' or other express indication of the limits of the "class or category of people entitled to sue for any breach of the "regulations whereby they sustain injury; and regulation 10 of "the Shipbuilding Regulations is itself in perfectly general terms "which do not state or define the class of persons to be "protected."

Parker L.J. considered that under section 79 the matter was at large, but that there must clearly be some limit. Reading the Act of 1901, however, as a whole, he thought it clear that the Act was dealing with, and the Secretary of State could make regulations in respect of and affecting persons employed in the factory or premises. He rejected the further suggested limitation either to persons employed in the factory by the occupier or to persons employed in the factory by whomsoever, but in connexion with the process or manufacture. Turning to the regulations made under that power he pointed out that it was, of course, open to the Secretary of State to cut down, though not enlarge, that class of person, and that further limitation may be introduced either expressly or implicitly. Looking at regulation 10 he could see no ground for implying any limitation.

My Lords, I find myself in complete agreement with the conclusion reached by the members of the Court of Appeal, and for myself I would respectfully adopt the reasoning of Parker L.J.

I think there must be some limit to the enabling power, but the whole scheme of this safety legislation seems to me to indicate that persons employed in the factory are not altogether outside its scope. The fact that they are sometimes expressly included in the provisions of the Act does not, to my mind, point to the conclusion that they are outside the scope of an enabling section unless expressly included. When, therefore, I find, as here, an enabling section in general terms, I would construe it as, at any rate, enabling regulations to be made for the benefit of any of the classes of persons who are afforded protection in certain parts of the Act. If this is correct, the remaining question is whether this particular regulation 10, read in conjunction with paragraph (*b*) of the "Duties" provisions, impliedly imports some

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[29] [1957] 1 Q.B. 134, 148, 154.

H. L. (E.)

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Lord Tucker.

limitation beyond that which is contained in the enabling section. I can find no justification for any such limitation. A ship undergoing repairs in dry dock is regarded as a factory in which dangerous work is being done, an obligation is expressly imposed upon the owner of the ship with regard to protection of certain parts of the ship which are not required to be used for the purposes of the repairs. This is presumably for the protection of persons whose employment necessitates their presence in the dangerous area on their way to or from their work or near to their work. A member of the crew is one of the factory maintenance staff and if his work requires him to be in the danger area I can see no reason why he should not be entitled to the benefit of this particular safety regulation. It does not, in my view, by any means necessarily follow that he is entitled to the benefit of all the regulations; some of them may by their very nature be applicable only to persons engaged in a particular operation. The decision of this case does not require any attempt to give a definition of the words "persons employed." There may be cases where this will be necessary, but in the context of regulation 10 it must, I think, include a person employed by a shipowner whose regular full-time employment is as a member of the maintenance crew on a ship in dry dock undergoing repair.

For these reasons, I would uphold the decision of the four judges who have dealt with this case below and dismiss this appeal.

LORD KEITH OF AVONHOLM. My Lords, I had some doubt whether in the circumstances of this case the appellants owed any duty to the respondent under regulation 10 of the Shipbuilding Regulations, 1931. The regulations are capable, however, of two constructions, and my doubts are not strong enough to make me prefer a construction different from that reached by your Lordships. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Hill, Dickinson & Co.; Mawby, Barrie & Letts for Silverman & Livermore, Liverpool.*

F. C.

[HOUSE OF LORDS.]

NATIONAL BANK OF GREECE AND ATHENS S.A. . . . . APPELLANTS;

AND

METLISS . . . . RESPONDENT.

H. L. (E.)*

1957
Oct. 10, 14, 16, 17, 21, 22;
Nov. 25.

Conflict of Laws — Succession — Corporation — Foreign legislation — Comity—Universal succession—Foreign bank liable on English debt —Obligations on debt suspended in foreign bank's State of origin by moratorium—Legislation by foreign State merging debtor bank with another bank in State of origin — New amalgamated bank decreed "universal successor" to former banks — Recognition of universal succession by English courts—Right of creditor to sue new bank in England — Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 208.

Conflict of Laws—Foreign legislation.

Judicial Precedent—No binding precedent—Principle of rational justice —Conflict of laws.

In 1927 a Greek bank issued sterling mortgage bonds, repayable as to principal in 1957 with interest thereon meanwhile. A term of the bonds provided that questions arising should be settled in accordance with English law and they were guaranteed as to principal and interest unconditionally by another Greek bank. In 1941 payment of interest ceased and no further interest was paid thereafter. In 1949 the Government of Greece declared a moratorium (which continued in force at all material times) on all obligations on the bonds, including any right of action. In 1953, by an Act of the Government of Greece and by royal decree, the guarantor bank and a third Greek bank (hitherto unconnected with the bonds) were amalgamated into a new banking company, and it was enacted that the new company was the "universal successor" to the rights and obligations of the amalgamated companies. In 1955 an offer was made by the original debtor bank to English bondholders, to be guaranteed by the new company. The holder of bearer bonds did not accept that offer, but brought an action in the High Court against the new company, claiming interest from 1941 to 1955 inclusive, on the ground that the entire assets and liabilities of the guarantor bank, including its liability under the guarantee, had been assigned and transferred to the new company. It was conceded that the proper law of the bonds was English law, and that the status of the new company must be recognized:—

Held, (1) that the new bank must be recognized as clothed with the attributes with which it had been invested by the Greek Act, namely, the assumption of the assets, powers and liabilities of the old bank.

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD TUCKER, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

H. L. (E.)

1957

NATIONAL BANK OF GREECE AND ATHENS S.A. *v.* METLISS.

Per Viscount Simonds (Lord Somervell agreeing). In the absence of authority binding the House, the question was simply: "What did justice demand in such a case as this?"

Per Lord Tucker. The fact that this liability was attached to the new bank at its birth by its creator could properly be regarded as a matter pertaining to its status, and accordingly governed by the law of its domicile.

Antony Gibbs & Sons v. *Société Industrielle et Commerciale des Métaux* (1890) 25 Q.B.D. 399; 6 T.L.R. 393 distinguished.

Kleinwort, Sons & Co. v. *Ungarische Baumwolle Industrie Aktiengesellschaft* [1939] 2 K.B. 678; 55 T.L.R. 814; [1939] 3 All E.R. 38 considered.

(2) That, it being rightly conceded that the old bank could not have relied on the moratorium, if sued in England, the obligations on the bonds, in English law, the proper law of the contract, could not be varied by the foreign legislation.

(3) That, accordingly, the action succeeded.

Decision of the Court of Appeal [1957] 2 Q.B. 33; [1957] 2 All E.R. 1 affirmed.

APPEAL from the Court of Appeal (Denning, Romer and Parker L.JJ.).

This was an appeal, by leave of the Court of Appeal, by the appellants, National Bank of Greece and Athens S.A. (the defendants in the action) from an order of that court, dated March 18, 1957, and entered on March 29, 1957, whereby it dismissed the appellants' appeal from a decision of Sellers J., dated July 12, 1956. By that decision judgment was entered for the respondent, Cyril Metliss (the plaintiff in the action) for the sum of £6,241 5s. 1d. with costs. It was ordered that the costs of the appeal be paid by the appellants to the respondent.

The facts, stated by Viscount Simonds, were as follows: The respondent was the holder of bonds of the total amount of £29,700, part of an issue of £2,000,000 7 per cent. sterling mortgage bonds issued by the National Mortgage Bank of Greece in December, 1927, and guaranteed by the National Bank of Greece. Both those companies were incorporated under Greek law.

In the year 1935 the provisions of the bonds were modified so as to reduce the rate of interest from 7 per cent. to $4\frac{3}{4}$ per cent. and to provide that bondholders resident in Greece should be paid only in drachmae. Those modifications, the latter of which did not affect the respondent, were agreed to by the guarantor, the National Bank of Greece.

On December 6, 1955, the respondent, having in vain presented for payment coupons for interest which had accrued since June 1, 1941, brought an action in the Queen's Bench

Division not against the original debtor nor against the guarantor but against the appellants, the National Bank of Greece and Athens, claiming unpaid arrears of interest for 14½ years to June 1, 1955, amounting to £15,083 12s. 6d. He recovered judgment for £6,241 5s. 1d., being the interest due for the six years preceding the presentation of coupons. An appeal by the appellants was dismissed by the Court of Appeal.

In April, 1941, the Germans and Italians occupied Greece and payment of the sums falling due under the bonds ceased and (so far as the bonds in question in this case were concerned) was never resumed. In November, 1949, the suspension of payments was regularized by the Greek Emergency Law No. 1318 of November, 1949, which suspended the service on Greek bonds payable in foreign countries (including these bonds) until June 30, 1952. The Emergency Law was ratified by the Greek Law No. 1586. The moratorium was continued by Greek Law No. 2204 of 1952 until June 30, 1954, then by Greek Law No. 2948 of 1954 until December 31, 1954, then by Greek Law No. 3162 of 1955 until June 30, 1955, and by Greek Law No. 3274 of 1955 until December 31, 1955. Thus the moratorium was still in force at the date of the issue of the writ in this action on December 6. 1955. Those laws expressly operated to suspend, not merely all remedies for enforcement of the bonds in question, but also the obligation to make payments, and it was conceded by the respondent that, if he sued in Greece, the moratorium would be an effective defence to his action.

The appellants, a company incorporated under Greek law, owed their existence to an Act of the Greek Parliament and a decree made under it. By the Act, which was enacted on February 18, 1953, and was numbered Act No. 2292, it was provided (taking the so-called official translation) that: "When "the amalgamation of limited liability banking companies is con"cerned, the legal provisions in force are amended as follows." Then followed provisions relating to amalgamation consequent on shareholders' meetings which need not be referred to. Then came section 4: "No description of the items contributed is "required, in the relative contract of amalgamation nor in the "statutes, in the case of amalgamation by formation of a new "company, provided that all the assets and liabilities of the "banking companies amalgamating are contributed as a whole. "The company which absorbs another company by merger, or "the new company formed by the amalgamation, becomes the "universal successor to the rights and obligations in general of "the amalgamated companies, without any other formality or "act whatsoever."

Section 8 provided: "Wherever in a law, decree or ministerial decision reference is made to one of the above-mentioned "amalgamated limited liability banking companies by shares, it "is understood that reference is made to the new limited liability "banking company formed pursuant to the amalgamation, and "generally all provisions in force of laws, decrees or ministerial "decisions in favour of one of the amalgamated companies are "considered as being in favour of the new company as from the "formation of the latter."

Section 10 provided: "The amalgamation of limited liability "banking companies by shares, by formation of a new limited "liability banking company by shares, may also be effected without a resolution of the general meeting of the shareholders, by "decree promulgated on the proposal of the council of Ministers."

It was under the authority of this last section that on February 27, 1953, a decree was promulgated under which the National Bank of Greece, and another Greek company, the Bank of Athens, were amalgamated and a new limited liability company by shares formed under the style "National Bank of Greece and Athens" having its seat in Athens and as objects the carrying on of the business of the amalgamated banks for a period of 50 years. The decree prescribed the terms of amalgamation in respect of shareholders and other matters, and then by clause 5 provided that as from the publication of the decree the two companies, the National Bank of Greece and the Bank of Athens, should "cease "to exist and the entire property of each of them in its whole "(assets and liabilities) on the day of publication is considered "as being automatically contributed to the new limited liability "banking company by shares, constituted by virtue of these "presents, which is substituted ipso jure and without any other "formality, in all rights and obligations of the said amalgamated "banks as their universal successor." (This was again the language of the official translation.)

Thus the guarantor bank, which owed its existence to the law of Greece, was by the same law extinguished. On the other hand, the original debtor bank was left untouched by that or, so far as appeared, any other decree, and on October 27, 1955, asserted its continued existence by making an offer to the holders of its sterling bonds, which was rejected by the respondent. On the contrary, within a few days he presented his interest coupons to Hambros Bank Ltd. (one of the paying agents named in the bonds) for payment, and, payment being refused, brought this action, not against the debtor bank, but against the new company created by the Greek decree of February 27, 1953.

The new company, the appellants, duly registered with the Registrar of Companies the prescribed particulars under section 410 of the Companies Act, 1948, and thereafter carried on business in this country.

Thomas Roche Q.C. and *N. H. Lever* for the appellant bank. As a matter of English law, Greek law is not to be applied to this contract. The proper law of the bonds being English law, a foreign decree cannot modify their terms or substitute one company for another as a party thereto. Alternatively, if the court is to take account of Greek law, it must take account of all of it, including the moratorium, so that under Greek law the appellants succeeded only to a suspended obligation to the respondent. So, in the first place, the Greek Parliament cannot affect an English contract. Even though it may kill its own creature company and create another, it cannot push that new creature into an English contract. In the second place, because of the moratorium, Greek law does not render the appellants liable, although it is conceded that the old company could not have relied on it.

Two questions, therefore, arise in this appeal: (1) Is Greek law relevant at all? That is a question of English law. If it is not relevant, no other question arises. (2) If the Greek law can be invoked, does it have the effect of rendering the appellants immediately liable? That is a question of Greek law to be determined on the evidence of the Greek lawyers.

The first question may be approached in five stages. (a) Take a case of a contract, the proper law of which is English, providing for a payment to be made in England. The English courts would not recognize that foreign legislation had power to suspend or modify the nature of the obligations as to time or extent: see *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft* [1] and *Kahler* v. *Midland Bank Ltd.*[2] (b) The English courts would not recognize foreign legislation abolishing an obligation recognized by the general law of England, e.g., legislation to the effect that Ruritanian subjects were no longer liable to pay their hotel bills in England. (c) The English courts would not recognize foreign legislation purporting to transfer the obligations of a contract of which the proper law was English law. For example, suppose the benefit and burden of all contracts of guarantee by French banks were purported to be transferred to the French State, so that, although the Crédit Lyonnais was still existing and carrying on business in England, it was no longer to be liable on a contract of guarantee. The English courts would not recognize that legislation nor allow the Crédit Lyonnais to plead it as a defence, so as to relieve itself of liability, if the plaintiff suing it had not accepted the transfer. Foreign legislation cannot relieve a solvent debtor of liability and replace him by a man of straw. (d) If the French Government passed a law dissolving the Crédit Lyonnais, the English courts would recognize the dissolution but not the extinction of a debt which it owed in England. (e) The same would apply if French legislation transferred the liability to a new French bank.

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[1] [1939] 2 K.B. 678, 693, 696; 55 T.L.R. 814; [1939] 3 All E.R. 38.

[2] [1950] A.C. 24, 56; 65 T.L.R. 663; [1949] 2 All E.R. 621.

Take, by analogy, the death of a debtor. English law is clear. It does not accept a foreign representative: see Dicey's Conflict of Laws, 6th ed., p. 450, r. 104. The law of bankruptcy is not against the appellants. English law gives limited acceptance to the vesting of assets under a foreign decree but absolutely declines to admit that such a decree can discharge liability under a contract the proper law of which is English: see Dicey's Conflict of Laws, pp. 438 et seq., rr. 98, 99, 101, 102 and 103. Rule 102 is taken from *Antony Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux*.[3] There is a distinction between an assignment of assets and a transfer of liability. Our law never recognizes a transfer of liabilities save by novation, and there is no novation here. See also *Clark* v. *Williard*.[4]

In *Beavan* v. *Lord Hastings*[5] it was held that a universal successor under Belgian law was not liable to a creditor in equity in an English court. If the obligation on the defendant was created by Belgian law, it had to be judged by Belgian law. Here the question is as to the effect of the particular Greek statute as shown by the evidence of the Greek lawyers.

The appellants are sued on an English contract of 1927. The answer is that they were not a party to it, nor even incorporated at that date. Prima facie that is a perfect case. By English law the respondent can only get over it (a) by pleading and proving a novation, which he has not done here, or (b) by showing that a statute of the country of the proper law of the contract makes the appellants liable, and that cannot be done here. The appellants rely on Lord Esher's judgment in *Antony Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux*.[6] The respondent here concedes that Greek law gives him no rights because by Greek law the obligation has been suspended. The appellants recognize that Greek law has power to kill the previous company, but that does not destroy its debt. Though the dissolution of the company prevents enforcement by action, it does not prevent enforcement in any other way, e.g., in the Companies Court by winding up.

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[3] (1890) 25 Q.B.D. 399, 407.

[4] (1934) 292 U.S. 112; (1935) 294 U.S. 211.

[5] (1856) 2 K. & J. 724.

Assuming, however, that the appellants are wrong on that point, the Greek statute has not the effect which the respondent claims of conferring a right to recover the debt, irrespective of the moratorium. See by way of analogy section 208 of the Companies Act, 1948, and *Nokes* v. *Doncaster Amalgamated Collieries Ltd.*[7] This is a Greek statute and the English courts are not in a position to construe it save on the evidence of the Greek lawyers. The Greek Parliament has evinced no intention to impose on its creature, the appellant company, an obligation which it has hitherto refused to recognize. When Law No. 2292 refers in section 4 to "obligations," it means obligations which are recognized by Greek law. The word is not wide enough to include a debt which Greek law, as a matter of public policy, declines to recognize. The effect of section 8 of the same law is to make the debt subject to the moratorium. The moratorium was in force both at the date of the amalgamation and at that of the writ in the action. On the evidence of the Greek lawyers, the appellants were made subject to a suspended obligation and it is still suspended.

The respondent is suing on an English contract and admits that the appellants are not an original party. He cannot succeed unless he pleads or proves novation or an English statute. He does not do either. Never have the English courts recognized that a foreign statute can modify the terms of an English contract. Assets are capable of personal assignment, but not liabilities. A succession imposed by a foreign law to an obligation arising under an English law is not recognized by the English courts.

H. N. Lever following. It is clear that if there is any liability on the appellants it must derive from the Greek Government's intervention. Therefore to make them liable one must find two conditions existing: (1) that Greek law has assigned to the appellants present liability in respect of the debt—a pure question of fact—and (2), if it has assigned this liability, that it has given the respondent the right to bring proceedings in the English courts.

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[6] 25 Q.B.D. 399.

[7] [1940] A.C. 1014, 1019, 1020, 1021; 56 T.L.R. 988; [1940] 3 All E.R. 549.

If the Greek statute passed on this obligation, it must have been in a form tolerable to Greek law, but the moratorium was part of Greek law. In considering the creation of the new company, one must have regard to the other acts of the Greek sovereign power, and it is evident that it was desired that the moratorium should protect the new company. When it created the new company it had the chance to make the moratorium effective and it did so. The Greek sovereign power which created the bank had made it impossible to pay this debt in sterling and had forbidden the Greek courts to entertain or enforce the claim, since Greece was seeking to preserve her sterling position by means of the moratorium.

If the appellants are answerable at all in the English courts, it is the Greek sovereign power which has made them liable, but the whole of Greek law must be looked at, including the moratorium, to see whether that result has been produced. The court must find Greek law as a question of fact, ignoring English law.

This is not a question of status. The liability of one person to answer for the debt of another is a question of obligation. If the Greek statute had said that a private citizen should be liable for this debt, it would have been at once apparent that this was a question of obligation and not of status. The appellants are not obliged to pay as a matter of status.

It is sought to put on the appellants an obligation forbidden to Greek citizens as a matter of public policy. If they attempted to discharge it they would be acting beyond their powers under Greek law. It would be contradictory for the Greek sovereign power to give the appellants a status which made them liable for another person's debt and at the same time give them a status which made it illegal for them to pay it.

There can be found in the authorities no previous attempt to make the supposed universal successor of a defunct company liable for its debts. No one can sue or be sued as heir in England unless he takes out letters of administration here. If the Court of

Appeal are right in this case, someone in England who inherited as heir from his brother abroad could be sued to the extent of all his personal fortune for the debts of the deceased. The English courts do not recognize a succession to liability imposed by foreign law.

John Foster Q.C., Mark Littman and *Louis Blom-Cooper* for the respondent. If the appellants' argument on the first point were right, then even if there were no moratorium they would not be liable in England, on the ground that they are strangers to the guarantee; thus, apart from the moratorium, they would be liable in Greece but not in England.

As to the effects of status, see *In re Luck's Settlement Trusts.*[8] One of the things decided by status is the nature of a corporation. The question whether on an amalgamation the new company has succeeded to the rights and obligations of the two amalgamated companies is a question of status, because succession is a question of status. The amalgamation of two foreign corporate bodies affects the status, personality and powers alike of those two bodies and of the entity which the amalgamation creates; it is governed by the law of their domicile. The attribute of universal succession is an incident of the amalgamation. The question whether a legal person incorporated in a foreign country is liable, under the statute which creates it, for its predecessor's debts and obligations affects its status and so is governed by the law of its incorporation.

Without assets and liabilities here the new company would not be an amalgamation. It is a new entity which stands in the shoes of the old bank. It is wrong to look at the matter from the point of view of contract only. The whole design of the Greek decree was to weld the two bodies together. Once it is admitted that the assets pass to the appellants, it follows that the liabilities pass too. The foreign legislation has extinguished the original debtor. When banks A and B were extinguished, phoenix-like out of the ashes the amalgam of A and B was created. When the first debtor was extinguished a new debtor was put in his place. The English courts must recognize that.

The taking out of administration is purely a question of procedure governed by English law, but English law must recognize the law of status and of succession for the courts to see who is entitled under the letters of administration. A foreign heir can be sued and the administrator is the attorney of the heir of the dead debtor. Take the case of a contract the proper law of which is English. The deceased (a party to the contract), his heir, a creditor under the contract and the assets of the deceased are in Belgium. If the heir and the creditor come to England, the creditor can sue the heir without the intervention of letters of administration, since the courts would recognize that the successor stood in the place of the original debtor: see *per* Romer L.J.[9] and Parker L.J.[10] in the Court of Appeal in the present case. See also Dicey's Conflict of Laws, 6th ed., pp. 458–459, r. 107 and illustration 4. Apart from the moratorium question, that establishes the respondent's argument. The English courts recognize both the creation and destruction of foreign corporations by the law of their country of domicile: see *Lazard Brothers & Co.* v. *Midland Bank Ltd.*[11] As to succession of spouses to each other's goods on marriage under some continental systems of law, see *per* Parker L.J. in the Court of Appeal [12] in this case. The case of an amalgamation of two companies is stronger than that of marriage because for physical reasons one does not have to kill the spouses and create a new entity.

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[8] [1940] Ch. 864, 890–891; 56 T.L.R. 915; [1940] 3 All E.R. 307.

As to standing in the shoes of a previous debtor, see *Alivon* v. *Furnival.*[13]

Corporations are recognized as being governed by the law of their incorporation. In this case an incident of the status of the appellant corporation is the amalgamation. The same principles apply in the case of succession and commercial amalgamation. Comity of nations is not the basis of the recognition of foreign corporations: see *per* Erle C.J. in *Branley* v. *South Eastern Railway Co.*[14] Liability is subject to the law of the company's domicile and incorporation: see *General Steam Navigation Co.* v. *Guillou* [15] and Cheshire on Private International Law, 5th ed., pp. 200, 201. To ignore this amalgamation would not fit in with the principles which English law has recognized and must recognize: see *Pickering* v. *Stephenson.*[16] Capital reduction or increase depend on the law of a company's incorporation, and this may affect the rights of the creditors.

Reliance is placed on article 3 of the appellant company, which states that the entire property of the National Bank of Greece and the Bank of Athens "taken as a whole (assets and

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[9] [1957] 2 Q.B. 33, 49; [1957] 2 All E.R. 1.

[10] [1957] 2 Q.B. 33, 53.

[11] [1933] A.C. 289, 297; 49 T.L.R. 94.

[12] [1957] 2 Q.B. 33, 51–52, 53.

[13] (1834) 1 C.M. & R. 277, 296.

[14] (1862) 12 C.B.N.S. 63, 70.

[15] (1843) 11 M. & W. 877.

[16] (1872) L.R. 14 Eq. 322, 340.

"liabilities) are automatically transferred to the National Bank "of Greece and Athens S.A. which becomes the owner, ipso jure, "and without any formality whatsoever, of all the rights and "obligations of the aforesaid banks as the universal successor "of them." Clause 5 of the decree of 1953 would lead one to suppose that the assets and liabilities in England were transferred to the appellants. This amalgamation has the quality of a universal succession.

Amalgamation is a matter of status. It is status that should be recognized by the United Kingdom. This does not mean that the respondent is suing on a foreign statute; he is suing on an English contract of guarantee, proceeding against the original debtor whose existence is being continued in the appellants.

In summary: (1) The respondent is suing on his original contract with the old bank, and in order to ascertain the identity and legal character (i.e., the status) of the old bank reference is made to the law of its domicile, that is, Greek law, the law of its incorporation, since no other law can be referred to. (2) Greek law is to the effect that the identity of the old bank has become merged in that of the appellant bank. The identity of the old bank continues as an amalgam of the old bank and of the other bank with which it was merged. (3) This fact is established by the evidence and should be recognized by the English courts because (a) the Greek conception of universal succession corresponds to the practice of civilized nations, including this country; (b) non-recognition would be contrary to the comity of nations and the requirements of commerce; (c) even if a winding-up order could be obtained in England, that would be no substitute for an obligation to pay which was at no time limited to payment out of the English assets; and (d) non-recognition would relieve the appellants of that very liability which by the registration of their articles under Part X of the Companies Act, 1948, they have informed the English public that they have assumed. According to the evidence of Greek law, there was here a universal succession under which all rights and liabilities passed.

As to proposition 3 (a), see *Starkowski* v. *Attorney-General.*[17] As to the effect of amalgamations, see *per* Denning L.J. in the Court of Appeal in the present case [18]; section 208 of the Companies Act, 1948; section 2 (*b*) of the Mining Industry Act, 1926;

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[17] [1954] A.C. 155, 174; [1953] 2 All E.R. 1272.

[18] [1957] 2 Q.B. 33, 43.

section 1 (1) of the Trade Union (Amalgamation) Act, 1926, and section 85 (1) (*b*) of the National Health Insurance Act, 1936. As to the conception in other systems of law, see *Helvering* v. *Metropolitan Edison Co.*[19]; Holmes on the Common Law (1882 ed.), pp. 340, 341, 343, 345; Fraser's Husband and Wife (1878 ed.), vol. II, p. 1321; Encyclopaedia of the Laws of Scotland, vol. VII, p. 541, para. 1350.

If the assets of the old bank have passed to the new bank, there can be no winding up of the old bank in England, as suggested by the appellants: see *Russian and English Bank* v. *Baring Brothers & Co.*[20] and *Banque des Marchands de Moscou* (*Koupetschesky*) v. *Kindersley.*[21]

The evidence shows that the appellant bank is in exactly the same position as the old, no more and no less. The amalgamation law is not a law of change. In the case of both the old company and the new the moratorium law applies in Greece but not in England. A foreign law cannot affect an English contract: *Kleinwort's* case.[22] It cannot absolve the heir from liability under the contract. If the new debtor could be allowed to get rid of his liabilities, the effect of that decision could be circumvented by voluntary amalgamation, not only by amalgamation effected by the policy of a foreign State.

Mark Littman following. If one contracts with a Greek, one contracts with a personality, and his character and status is governed by Greek law and may be changed by Greek law. Succession to a deceased person is a matter of status governed by the law of his domicile. The appellant bank is in the same position as the old bank quoad its assets and liabilities, and the English courts recognize the succession to the assets and liabilities created by Greek law. Clause 5 of the Greek decree when it refers to "all rights and obligations" means "all." It was only in Greece that there was a suspended liability.

Thomas Roche Q.C. in reply. The respondent is suing under the original contract and is relying on the Greek statute of 1953. But no case was cited in which an English court has given judgment on an English contract against a person who was not a party to the original contract. That is significant. English law does not admit of such a transfer of the liability under a contract: see Dicey's Conflict of Laws, 6th ed., pp. 570, 573, r. 132.

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[19] (1938) 306 U.S. 522, 529.

[20] [1936] A.C. 405, 426, 428; 52 T.L.R. 393; [1936] 1 All E.R. 505.

[21] [1951] Ch. 112, 126; 66 T.L.R. (Pt. 2) 654; [1950] 2 All E.R. 549.

[22] [1939] 2 K.B. 678.

Assets can be assigned. The question whether they have in fact been assigned here depends on the terms of the Greek statute. A bank balance is transferable in English law and this Greek statute has purported to transfer such balances. But a Greek statute cannot transfer the benefit of an English contract for personal service because in English law it is not assignable. So, too, other rights and liabilities must be capable of transfer under English law before the English courts will recognize their purported transfer by a Greek statute. Suppose Barclays Bank had lent a million pounds to the old bank for three years, then, according to the respondent's contention, they would have to continue the loan to the bank created by the amalgamation. But, if they wished, they could petition for the winding up of the old bank if they took prompt action to get its assets in England. This is not a case of a reconstruction of a company which goes on with reduced capital; it is the destruction of two personae and the creation of a new persona.

Succession is not a question of status and is not listed as such by Scott L.J. in *Luck's* case.[23] If succession were a matter of status the principle would apply to realty. The position is dealt with in Dicey's Conflict of Laws, pp. 811, 814, rr. 177, 179. The English courts only recognize the title of an administrator derived from an English grant.

If a woman, having contracted debts in England, married an impecunious foreigner in a country where there was community of goods between spouses, the English courts would not regard the liability as transferred from her to him.

To say that all obligations pass in this case without qualification avoids the question: what is an obligation?

Their Lordships took time for consideration.

November 25. VISCOUNT SIMONDS. My Lords, your Lordships will see at once how important and novel a question is raised in this appeal. For I am not aware of any case, nor has the industry of counsel discovered one, in which in the courts of this country a plaintiff has, without a plea of novation or statutory assignment, recovered a sum due under a contract from one who was not a party to that contract. It will be necessary to examine closely the circumstances which in the opinion of Sellers J. and the Court of Appeal support the claim.

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[23] [1940] Ch. 864.

A further question, not of general importance, is also raised whether, if the appellants are suable in this action, they can claim the benefit of a moratorium decreed by Greek law which would undoubtedly avail them if they were sued in Greece.

[His Lordship stated the facts relating to the first question and continued:] It must also be added that it has not been, and could not be, alleged that there has been a novation of the original contract between the respondent and the appellants. The respondent rests his claim against the appellants on Greek law and specifically on the decree of February 27, 1953, and on nothing else.

I have so far said nothing about the second point that arises in this case, viz.: how far the appellants can avail themselves of the Greek moratorium laws to which I will refer later, even if they are otherwise liable on the bonds. I propose to defer any discussion of this point until I have dealt with the main question.

To the respondent's claim the appellants object in brief that they were not parties to the original bonds and therefore are not liable in respect of them, that the proper law of the bonds was English law, and no foreign decree can operate to modify the terms thereof or to substitute one company for another as a party thereto and (stating the same proposition in other words) that English law does not recognize a succession imposed by a foreign law to an obligation arising under a contract governed by English law. Each one of these propositions is challenged by the respondent so far as it relates to the present claim except that it is now conceded, as was held by the trial judge, that the proper law of the contract is English.

My Lords, it must be apparent that, if the appellants are right, a strange situation is revealed. Here is a company whose status is recognized by the courts of this country because it is incorporated by the law of its domicile. By that law it is invested with duties, powers, assets, liabilities. It admits that, if sued in Greece, it would be liable on the bonds here in question, subject always to the benefit of any moratorium. It comes to this country, carries on its business, and assumes unchallenged possession of the assets of the dissolved company. It is the strange climax of this narrative that it then disclaims a liability to which that dissolved company was undoubtedly subject. I do not think that an English court of justice should readily give effect to such a pretension, and I will in the first place examine such authority as was cited by counsel for the appellants in support of his propositions.

In the forefront was put *Antony Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux*,[1] a case which will be found to illustrate well the fallacy of the appellants' contention. In that case, according to the headnote, a party to a contract made and to be performed in England is not discharged from liability under such contract by a discharge in bankruptcy or liquidation under the law of a foreign country in which he is domiciled. The parties having entered into a contract of which the law was indisputably English law the defendants made default and in defence of a claim made against them in an English court pleaded that they had been placed in judicial liquidation by the Tribunal of Commerce of the Seine, France being the country of their domicile. This plea was vigorously rejected by the court, Lord Esher saying[2]: "I wish to base my judgment, however, on "the assumption that they were so discharged [i.e., by the order "of the French court]. I say that, assuming that to be so, the "suggestion that the defendants would be discharged in this "country by a law of the country of their domicile is altogether "outside the general principle that governs such matters, and "cannot be supported." This statement of the law is repeated as rule 102 in Dicey's Conflict of Laws, 6th ed., p. 447, and, subject to certain immaterial qualifications, can be accepted by this House. But what bearing has it on the present case? It would, no doubt, be relevant if the original guarantor company were being sued and pleaded that they had been dissolved by the law of their domicile and their liability ended. But that is not what has happened. It is not an issue in this case whether the original guarantor company could still be sued notwithstanding that it has been wound up and its liabilities transferred to the new company under Greek law, and it is the fundamental fallacy of the appellants' argument that the two propositions are treated as complementary, that is to say that, if our law would regard the original company as still liable, the new company can disclaim the liability which is imposed upon it by Greek law—and, I would say, imposed upon it as a condition of its existence, but that is to anticipate what I shall say on another aspect of the case.

Reliance was next placed on some observations of the Court of Appeal in the case of *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft*.[3] They have so little relevance to the present case that I hesitate to occupy time by referring to them. The question there was whether a contract of which the proper law was English and which was to be performed in England was enforceable in the English courts although its performance might involve a breach by the defendants of the law of Hungary. The court did not challenge the principle that[4] "a contract (whether lawful by its proper law or not) is, in "general, invalid in so far as the performance of it is unlawful "by the law of the country where the contract is to be per-"formed," but rejected with lively references to the possible laws of Ruritania the suggested extension of this principle to a case where the contract is lawful in the country where it is to be performed. Your Lordships have recently had occasion to examine this question at some length. I can only say that it appears to me to be irrelevant to the question whether our courts will recognize the liability of the appellants to an obligation imposed on them by their own law.

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[1] (1890) 25 Q.B.D. 399; 6 T.L.R. 393.

[2] 25 Q.B.D. 399, 407.

[3] [1939] 2 K.B. 678; 55 T.L.R. 814; [1939] 3 All E.R. 38.

No other authority, I think, was cited in support of the appellants' contention. The question is rather one of principle and analogy, though analogies are dangerous and principles difficult to state with precision. The analogy, which has found some favour with the courts below and is not without its use, is in the conception of universal succession. That is a conception of the Roman law which found its way into many systems of law including, as my noble and learned friend Lord Keith of Avonholm has pointed out, the law of Scotland. It may be assumed that the Greek legislature using the words "universal "successor" in the relevant Act was looking to the familiar principle under which the heir was the universal successor of his testator and regarded as eadem persona cum defuncto, and was asserting the identity of the new company with the old. But I do not care to rest my opinion upon a conception which is at the least artificial. The fact is that the new company is a new juristic entity which was not a party to any contract with the respondent, and I do not think that, when a competent legislature has created a corporation and vested in it all the powers, assets and liabilities of an old corporation, which is then dissolved, anything is added by a further reference to universal succession, unless indeed it can be said that such a reference makes the path seem more familiar and therefore easier.

In the same way it is easier to recognize the validity and efficacy of such a transfer if one recalls the many examples of statutory amalgamation of undertakings in this country, and, no doubt, in other countries. It might be said that it has become a commonplace feature of commerce and industry in the modern State that such amalgamations should take place, and that it has become a matter of comity to recognize them except in so far as they are in conflict with the positive law of the country where it is sought to give effect to them.

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[4] [1939] 2 K.B. 678, 694.

But, my Lords, in the end and in the absence of authority binding this House, the question is simply: What does justice demand in such a case as this? I believe that justice will be done if your Lordships think it right not only to recognize the fact that the new company exists by the law of its being but to recognize also what it is by the same law. It is conceded that its status must be recognized. That is a convenient word to use. But what does it include or exclude? If a corporation exists for no other purpose than to assume the assets, liabilities and powers of another company, what sense is there in our recognizing its existence if we do not also recognize the purposes of its existence and give effect to them accordingly. If, for reasons of comity, we recognize the new company as a juristic entity, neither the Greek Government, the creator, nor the new company, its creature, can complain that we too clothe it with all the attributes with which it has been invested. Thus and thus alone, as it appears, justice will be done. It may not be inappropriate that, in dealing with this Greek company, I have used language which may to some of your Lordships be reminiscent of the words of a Greek philosopher of more than 2,000 years ago.

I conclude, therefore, that the appellants fail in their first contention that they are not liable upon the bonds which were guaranteed by the old company. If I have to base my opinion on any principle, I would venture to say it was the principle of rational justice. I turn now to the second question, whether, being sued in this country, the appellants can claim the benefit of the moratorium imposed by successive Greek laws.

[His Lordship stated the facts relating to the moratorium and continued:] My Lords, I think that in the consideration of this question some confusion has arisen out of the evidence of the experts on Greek law who were called on either side. They could, of course, give evidence as to the meaning and effect in Greek law of the statutes to which I have referred and say what, in their opinion, the result would be if the appellants were sued upon the bonds in a Greek court. But they could not give evidence upon the question which our courts, and ultimately your Lordships, have to decide, whether and to what extent in an action here the moratorium laws will be regarded as capable of affecting the obligations under the bonds which are admittedly governed by English law.

I have read and re-read the evidence and the statutes to which they relate, and am unable to extract anything from it except what may be said to be obvious, that the new company succeeded to (inter alia) the liabilities of the old company, including the liability on these bonds, but that, if the bondholder sued in a Greek court, he would be met by the moratorium and his action would fail. I can find no firm evidence that upon a true construction of the amalgamation decree the new company was to be in a better position than the old in regard to foreign contracts. On the contrary, there was repeated affirmation of the proposition that the new company was to be in just the same position as the old, having truly the advantage of any law of which the old company had the benefit but having nothing more. I ask, then, what would have been the position of the old company if sued here upon these bonds, and am absolved from any further examination of the question by the concession freely and, I think, rightly made by the appellants that the old company could not have relied on the moratorium. Clearly the obligations in English law (the proper law of the contract) could not be affected by a Greek law which purported to vary its terms. I would, for this purpose, regard a law imposing a moratorium as in the same category as a law creating a new period of limitation. In this respect it is interesting to note that the appellants, though it did not become necessary for them to rely on it, in fact pleaded the English Statute of Limitations as a partial answer to the claim. But, whether the law of the foreign country imposes a moratorium or a period of limitation, it cannot avail a defendant sued in the courts of this country. For these reasons I think that the contentions of the appellants on the second point also fail.

I ought not to conclude without referring to an argument powerfully presented by junior counsel for the appellants, which made some appeal to me. It was to the effect that it was to the last degree improbable that the Greek Government, having as a matter of public policy imposed a moratorium upon the payment of these amongst other bonds, should then create a new corporation which in this country at least would not be able to take advantage of it. This may be so, though, where questions of policy are concerned, it would be unwise to come to any conclusion without a full knowledge of all the facts. But I have borne this aspect of the case carefully in mind in coming to the conclusion which I have stated. I cannot be satisfied by any extraneous consideration that the obligations of the new company in an English court are in any way different from those of the company of which it is the " universal successor."

The appeal should, in my opinion, be dismissed with costs.

LORD MORTON OF HENRYTON. My Lords, two questions arise for decision on this appeal. I would state them as follows: (1) Apart from the effect (if any) of the Greek statutes imposing a moratorium, does the Greek Statute No. 2292 of February 18, 1953, coupled with the decree of February 27, 1953, make the appellant liable in an English court upon the guarantee given by the National Bank of Greece in 1927? (2) If the answer to the first question is " Yes," does the existence of the moratorium under Greek law preclude the respondent from recovering the sum awarded to him by Sellers J.?

My Lords, I would answer " Yes " to the first question. On this point I am content to say that I agree with the Court of Appeal.

On the second question, counsel for the appellant puts his argument somewhat as follows. The rights of the respondent against the appellant arise only by reason of the Greek statute and decree, since the appellant was not a party to the contract of guarantee. It is therefore necessary to see exactly what obligation was imposed upon the appellant by the Greek legislation. That is a question of Greek law and is therefore a question of fact to be proved by the evidence of experts on the law of Greece. If the respondent goes to Greek law to establish his right, he must accept the whole of the relevant Greek law, and not only the part of it which suits him best.

So far, my Lords, I think that the argument has considerable force, and I shall assume, without so deciding, that it is right, and pass on to the next stage of the argument. Counsel next points out that the moratorium was in force when the amalgamation took place, since it had been extended till June 30, 1954, by a law of August 15, 1952, and as a result of subsequent extension it was in force when the writ was issued, and it is still in force. Counsel then submits that, according to the evidence of the experts on Greek law, the obligation which passed to the appellant was a suspended obligation and it is still a suspended obligation. I agree that this is the effect of the evidence, if one is considering only what would happen if this action were brought in a Greek court, but I do not think this helps the appellant. The evidence of the experts was that the amalgamation had the effect of putting the appellant in exactly the same position in all respects, as regards this obligation, as the old bank was in immediately before the amalgamation. Now, the position of the old bank immediately before the amalgamation was as follows. An action against it on the guarantee would have succeeded in an English court, but would have failed in a Greek court, because of the moratorium. As I understand the evidence, and in particular the evidence of Mr. Seferiades at pages 294 to 296 of Appendix II, immediately after the amalgamation the new bank was in exactly that position and is in that position today. If this is so, the respondent was entitled to bring the present action in England and to succeed in it.

For these reasons, my Lords, I would answer the second question in the negative and dismiss this appeal.

Lord Tucker. My Lords, the National Bank of Greece, the original guarantors of the bonds issued by the National Mortgage Bank of Greece in December, 1927, was a corporate entity created by Greek law. Its existence as a legal entity has been destroyed by the Greek decree of February 27, 1953, promulgated under powers conferred by an Act of the Greek Parliament (No. 2292) passed on February 18, 1953. English law will recognize both the creation and destruction of this foreign corporation by the law of the country of its domicile (cf. *Lazard Brothers & Co.* v. *Midland Bank Ltd.*[5]).

One of the consequences of the dissolution of this entity is that it is no longer possible to sue it and obtain judgment against it in an English court for a debt payable in this country. Statutory remedies to mitigate to some extent these consequences have been created by the provisions of the Companies Acts for winding up non-existent foreign companies with assets here. These statutory remedies, in my view, are not really relevant to the questions which your Lordships are called upon to decide in the present appeal.

The same decree which destroyed the National Bank of Greece created a new legal entity, namely, the present appellants, the National Bank of Greece and Athens, S.A., which was "substituted, ipso jure and without any other formality, in all "rights and obligations of the amalgamated banks" for the

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[5] [1933] A.C. 289; 49 T.L.R. 94.

National Bank of Greece and the National Bank of Athens, which latter corporation had also been extinguished by this same decree. The decree provided that the two former banks "shall "cease to exist and the entire property of each of them in its whole "(assets and liabilities) on the day of publication is considered "as being automatically contributed to the new limited liability "banking company [the National Bank of Greece and Athens "company] constituted by virtue of these presents."

English law will look at the Greek decree to determine the status of this new entity. It is contended, however, that the transfer of liabilities from the old bank to the new is no part of its status. It is said that "status" is confined to the existence, powers and dissolution of the new corporation.

My Lords, I think the result of this appeal really turns upon this short point. It is devoid of authority. I do not regard the case of *Beavan* v. *Lord Hastings*[6] as really affording any guidance.

The identity of the old bank has become merged in the amalgamation by a process which is by no means alien to English legal conceptions. It is of the very essence of the transaction that the liabilities and assets of the former should attach to the latter, and to recognize the existence of the new entity but to ignore an essential incident of its creation would appear to me illogical. Why an English court should be compelled to recognize that part of the decree which has extinguished the old bank but refuse to give effect to matters which are of the essence of the process of amalgamation I find it difficult to understand. In my view, the fact that this liability was attached to it at birth by its creator can properly be regarded as a matter pertaining to the status of the appellant company and accordingly governed by the law of its domicile.

On the second point, namely, the effect of the Greek moratorium, I am of opinion that Greek law is irrelevant. This was an English debt and the obligation to pay it, its quantum and the date of payment, are all governed by English law which will not give effect to the Greek moratorium. Denning L.J. (as he then was) said in the Court of Appeal[7]: "We recognize that "Greek law has power of life and death over the company which "it created, and we must accept the substitute whom it has "provided. But when the substitute stands in our courts to answer "for an English debt, it must answer according to English law,

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[6] (1856) 2 K. & J. 724.

[7] [1957] 2 Q.B. 33, 46; [1957] 2 All E.R. 1.

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Lord Tucker.

"which says the debt must be paid according to its terms." It is argued that the liability which attached to the new bank at birth was only a suspended obligation, but the nature of the obligation under an English contract must be determined by English law and the Greek moratorium would not have availed the original guarantor in an English court. It follows, in my opinion, that it cannot avail the appellant company, and I would respectfully accept the language quoted above as a concise statement of the grounds upon which this appeal should be dismissed.

Lord Keith of Avonholm. My Lords, I agree with the line of reasoning by which your Lordships have arrived at the conclusion that the liability of the appellant bank to the plaintiff involves a question of status. I find it easier, however, to approach the matter from the point of view of succession. The appellant was expressly declared by the relevant Greek statute and subsequent royal decree to be the "universal successor" of the banks which were absorbed and extinguished by the amalgamation decree. This conception, as expounded in the evidence in this case, is common to other legal systems which have borrowed from the Roman law. Used generally with reference to an heir who takes up a succession on death, it carries with it a liability on the heir to the deceased's creditors for the deceased's debts. From this aspect he represents the deceased. The persona of the deceased is regarded as continued in the heir, or, as it is otherwise expressed, he is eadem persona cum defuncto. He is no more to be regarded as a new party introduced into a contract than is an executor or administrator of a dead man's estate in English law. The term "universal "successor" may be foreign to English law but it cannot be regarded as strange in this House for the doctrine is part of the common law of Scotland, though now affected by statute, and till within the last hundred years had important consequences to the heir in a succession. As such the doctrine would not appear to have differed in its fundamental principles from the common law of Greece. I would quote only one short passage from Stair, III.4.23: "Heirs in law are called universal successors, quia "succedunt in universum jus quod defunctus habuit, they do "wholly represent the defunct, and are as one person with him, "and so they do both succeed to him activè, in all the rights "belonging to him, and passive, in all the obligations and debts "due by him."

There are material differences between a succession and a novation. In succession no question of contract arises. In both cases, it is true, the creditor will have lost the personal credit of the debtor on which he may be assumed to have relied. On the other hand, he will not have lost, in a universal succession, the security of the debtor's assets which will have passed to the successor and be available for the creditor, whereas in a novation no transfer of assets need take place at all. The extinction of a corporation under statute or decree and the passing of all its rights and liabilities to a successor exhibits, in my view, all the features of a universal succession. It may not generally be so regarded, but the consequences appear to me to be in many respects indistinguishable. But be that as it may, in the present case the new bank has been declared the universal successor of the old banks. The result is to fix on it the status and the liabilities of a universal successor. That, in short, is the effect of the evidence given of the Greek law, and in this matter, which is essentially a question of status, it is to Greek law that recourse must be had. I accordingly reject the contention that the appellant bank is not liable to be sued on the contract of guarantee, as not being party to the contract. It is just as liable as would be the executor in England of a deceased debtor.

The answer to the first point in the case really determines the second point taken for the appellant. If the appellant represents the old debtor it must be subject to all the pleas that affected that debtor. It stands in his shoes. The proper law of the contract is English law and it is conceded that if the original guarantor had been sued here the Greek moratoria could not be pleaded in defence. The same must apply, in my opinion, to the new bank which has succeeded to the liabilities of the old.

I would dismiss the appeal.

LORD SOMERVELL OF HARROW. My Lords, I agree with the opinion that has been delivered by my noble and learned friend on the Woolsack.

Appeal dismissed.

Solicitors: *Stibbard, Gibson & Co.; Hardman, Phillips & Mann.*

F. C.

H. L. (E.)*

[HOUSE OF LORDS.]

1957
Oct. 9, 10;
Dec. 4.

TAYLOR . . . . APPELLANT;

AND

NATIONAL ASSISTANCE BOARD AND ANOTHER RESPONDENTS.

Legal Aid—Disposable income—Subject-matter of dispute—Order for alimony pending suit after application but before computation by National Assistance Board—Whether claim for alimony pending suit "the subject-matter of the dispute"—Legal Aid and Advice Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 51), *s.* 4 (3)—*Legal Aid (Assessment of Resources) Regulations,* 1950 (*S.I.* 1950, *No.* 1358), *reg.* 2—*Legal Aid (General) (Amendment No.* 1) *Regulations,* 1954 (*S.I.* 1954, *No.* 166).

By section 4 (3) of the Legal Aid and Advice Act, 1949, the regulations made thereunder "shall include provision for securing "that the resources of a person seeking or receiving legal aid shall "be treated as not including the subject-matter of the dispute."

On June 14, 1955, a wife respondent in a divorce suit applied for a civil aid certificate to defend divorce proceedings. On June 27, 1955, an interim order for alimony pending suit at the rate of £450 per annum less tax was made in her favour. That sum represented her sole income at the material time. On August 18, 1955, the National Assistance Board assessed the wife's disposable income and capital, and fixed her maximum contribution at £107; in doing so, the board took into account as part of her resources the amount of alimony pending suit ordered; and the Law Society offered her a civil aid certificate on that footing:—

Held, that the sum of alimony pending suit had been properly taken into account. At the date of the application there was nothing to be included in the computation because a mere claim for alimony was not a resource on which a value could be put, but, once the order for alimony was made, the wife's disposable income included the sum payable and nothing excluded it from being taken into account, since it was never the subject-matter of the dispute.

Thorogood v. *Thorogood* (1955) The Times, October 20, p. 5, approved and distinguished.

Decision of the Court of Appeal [1957] P. 101; [1957] 1 All E.R. 183 affirmed.

APPEAL from the Court of Appeal (Denning and Hodson L.JJ. and Ormerod J.).

This was an appeal from three orders of the Court of Appeal, dated December 19, 1956, whereby the respective appeals of the respondents, the National Assistance Board and the Law Society, from an order made by Lord Merriman P., dated May 14, 1956, were allowed, and a notice in support of his order, dated July 12, 1956, and served by the present appellant, Mrs. Millicent Alexander Taylor, was dismissed.

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD TUCKER, LORD COHEN and LORD KEITH OF AVONHOLM.

The facts, stated by Viscount Simonds, were as follows: The appellant obtained from Lord Merriman P. a pronouncement and declaration that in relation to an application made by her for a civil aid certificate to enable her to defend and to cross-petition in a suit for divorce brought by her husband, she was entitled not to have the amount of any sum ordered to be paid to her for alimony pendente lite included in the computation of her disposable income for the purposes of her contribution to the said civil aid certificate. From that decision the present respondents, the National Assistance Board and the Law Society, appealed to the Court of Appeal, and that court, setting aside the President's order, held that the National Assistance Board (hereinafter called "the board") had rightly taken into account the alimony pendente lite to which she was entitled.

On March 10, 1955, the husband of the appellant presented a petition for divorce against her on the ground of cruelty. She thereupon applied to the appropriate committee of the Law Society for an emergency civil aid certificate under the Legal Aid and Advice Act, 1949, to enable her to defend the suit, to cross-petition for divorce on the ground of cruelty, and to apply for alimony pendente lite. Such certificate was granted on May 16, 1955. On May 19 the appellant accordingly issued a notice of application for alimony pendente lite, and on June 27, 1955, an interim order was made by Mr. Registrar Forbes against her husband in her favour for alimony pendente lite at the rate of £450 per annum less tax so long as she continued to occupy the former matrimonial home, to be increased to the rate of £650 per annum when she vacated it. On June 14, 1955 (13 days before the interim order was made) the appellant made a formal application for a full civil aid certificate to enable her to defend the suit, to cross-petition for divorce and to "claim maintenance "from my husband for myself and my children" (paragraph 8). On July 18, 1955, the board in purported exercise of their duties under section 4 of the said Act assessed the appellant's "disposable income" at the sum of £410 per annum. For reasons immaterial to this appeal this sum was afterwards reduced to

£370 per annum. It was common ground that the greater and the lesser sum alike were based on the inclusion in her resources of the alimony ordered to be paid to her pendente lite. The appellant had no capital.

Roger Ormrod and *R. B. Holroyd Pearce* for the appellant. The question is whether alimony pending suit is to be regarded as part of the matter in issue so as to be excluded from the calculation of the appellant's disposable income, that is to say, whether it falls within the expression "subject-matter of the "dispute" in section 4 (3) of the Legal Aid and Advice Act, 1949, and regulation 2 of the Legal Aid (Assessment of Resources) Regulations, 1950.

The only reason why it is suggested that it should not come within that expression is that it is too insubstantial—that it is only a claim. But once it is granted and quantified, that is no longer so. It is not to be taken into account. The section and the regulation are both relied on. The regulation refers to "the "dispute in respect of which application has been made for a "certificate," and the appellant applied for a civil aid certificate to claim (inter alia) maintenance. The basic point is that as soon as the alimony is ascertained it becomes a specific fund, specific enough to be the subject-matter of the dispute. The Court of Appeal held that it was insufficiently specific to form the subject-matter of the dispute, although they held that it was sufficiently specific to be part of the resources of the appellant. Section 4 (3) of the Act is quite general and under it one must exclude from the appellant's resources "the subject-matter of "the dispute," not "in dispute." The dispute includes all ancillary matters, as well as the granting of the divorce. The subject-matter is what the dispute is about.

Reliance is also placed on regulation 16 of the Legal Aid (General) Regulations, 1950, as amended by regulations 11 and 25 of the Legal Aid (General) (Amendment No. 1) Regulations, 1954. The result of regulation 16 (8) (which was added by regulation 11 of the regulations of 1954) is that the alimony is payable to the appellant and not to her solicitor, and that it is not subject to the provisions of the regulation laying down how an assisted person's solicitor is to deal with the money received. But for the introduction of regulation 16 (8) the conclusion contended for by the respondents would have led to the result that the sum of alimony would have been both subject to the provisions of regulation 16 and liable to be included in the appellant's resources for the purpose of determining her contribution, a result which should, if possible, be avoided. Alimony and maintenance were by the terms of regulation 16 (8) taken out of the chargeability of section 3 (4) of the Act, it being enacted that "for the purposes of section 3 (4) of the Legal Aid and Advice "Act, 1950, the expression 'property' shall not be taken as "including any moneys so payable." This amendment would have been wholly needless unless alimony and maintenance at the time fell within the expression "property recovered." If they were property recovered in the proceedings, and such property is included in what is the subject-matter of the dispute, they must be part of "the subject-matter of the dispute." For the present purpose the date of the certificate granted is crucial and binding. Reading regulation 16 with regulation 2 of the assessment regulations, one has a logical comprehensive scheme drawing the line between resources which can attract contributions and property which is subject to charge under regulation 16. That scheme cannot be disturbed. It fits in with sections 3 (4) and 4 (3) of the Act.

Further, the order for alimony was only an interim order. There was no finality in it and the dispute was not at an end when it was made. It is an anomaly of the Court of Appeal's conclusion that a small amount of alimony pendente lite would be subjected to contributions, whereas permanent maintenance would go free. Another anomaly of a decision in favour of the respondents would be that, whereas under section 3 of the Act the appellant's income is to be assessed on a yearly basis, alimony is usually payable for a far shorter period than a year, because normally the case is finally determined within a year.

An absurd result which would follow from a decision in the respondents' favour would be that the following situation might arise. A woman with no resources might apply for legal aid and be granted a certificate with a "nil" contribution; if she were granted alimony the result would be that she would be found to have a disposable income and would be ordered to pay a contribution; she would then go back to the registrar for more alimony, and if this were granted she would eventually obtain an amount which would put her outside the legal aid scheme, so that her income was no longer charged with contributions; her husband could then apply to have the alimony reduced. She would thus go up and down a ladder.

Reliance is placed on *Thorogood* v. *Thorogood*,[1] which was rightly decided.

The anomalies inherent in a decision in favour of the respondents more than balance those produced by one in favour of the appellant.

Sir Harry Hylton-Foster Q.C., S.-G., and *Rodger Winn* for the National Assistance Board. Under the relevant enactments payments of alimony pending suit can never be the subject-matter of the dispute. Alternatively, the payments in this case were not the subject-matter of the dispute at the proper time for computing the appellant's resources under the Act and the regulations.

The appellant's case was argued on the basis that "subject-"matter of the dispute" in section 4 (3) of the Act meant what the dispute was about, but the Court of Appeal rejected that contention, and the words in their context cannot have that meaning. Their meaning must be more restricted. They must refer to some specific fund or property which would pass as a result of the judgment in the case, or else remain untransferred, the sort of property which the court would preserve by injunction. That was the Court of Appeal's reading of the phrase and it was right. It must refer to some property the right to which will be determined by the suit. It is used only in the context of resources, and "subject-matter" in the subsection means something which, apart from the section, would be a resource. In regulation 2 of the assessment regulations it must mean something which has a value which the board can exclude. In the old Poor Persons Rules, which were abrogated by section 17 (3) of the Act of 1949, the phrase "subject-matter of such proceed-"ings" clearly bears the meaning contended for: see R.S.C., Ord. 16, r. 23 (1) (Annual Practice, 1949, p. xxi).

Alimony pending suit is as different as possible from property such as these words are dealing with. Schedule I, Part I, of the assessment regulations lay down rules as to what the board is to take into account and to disregard in computing the rate of income of the persons concerned. Rule 3, which sets out the matters to be disregarded, does not mention alimony.

The result contended for by the respondents is equitably right because Parliament cannot have meant a woman in receipt of a substantial income to get her litigation free. The alimony, where quantified, is not excluded under the relevant words. It is a resource created by the order, but the test is whether or not the ownership of that resource depends on the result of the proceedings. This resource has to be taken into account in computing the wife's resources.

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[1] (1955) The Times, October 20, p. 5.

As to *Thorogood* v. *Thorogood*,[1] that case was either wrongly decided in that it was held that the amount of an order for alimony could not be taken into account in assessing the wife's income, or else it is distinguishable from the present case, which is not one where an order for alimony was actually in operation and proceedings were taken by the husband to discharge it or to reduce the sum payable.

Further, taking the regulation to relate to income, the right to which is in dispute, it can only relate to income which exists in fact and the right to receive which is in dispute between the parties both at the date of the application for a certificate and at the time of computation of the applicant's income. It would be absurd if the board, knowing that there had been a change of circumstances since the date of the application, as a result of the order for alimony, had to go through the formality of making the computation as at the date of the application, since the applicant would be obliged to notify a change of circumstances and the board would then have to reassess her on the basis of the new resource. Here at the time when the board was required to make its computation there was no dispute about the alimony, which had already been ordered. The making of the order was a change of circumstances within regulation 8 (5) of the general regulations. The subject-matter of the dispute is not confined to the subject-matter as at the date of the application. The regulations do not modify the Act by so confining it.

Alimony and maintenance were never property recovered in an action and never could have been.

The appellant's reliance on the fact that the computation of income is to be on a yearly basis, whereas alimony would not normally last for a year, is not a powerful argument in face of the methods of computation directed by Part I of Schedule I to the assessment regulations. The board must look at the reality of the situation.

John Latey Q.C. and *B. H. Anns* for the Law Society. The arguments submitted on behalf of the board are adopted.

The overriding factor which emerges is that it was intended to exempt the assisted person from making contributions out of something which would be his only if he won.

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[1] (1955) The Times, October 20, p. 5.

The board is charged with two duties: (1) to ascertain what the resources of the assisted person in fact are, and (2), having done that, to look at each resource and see whether it is a subject-matter of the dispute in the sense that the right to it will depend on the result of the litigation.

If a wife has no order for alimony pending suit, her claim for it, which may or may not succeed, is not a resource. Once she has been awarded alimony pending suit that alimony is a resource, but is not the subject-matter of the dispute because it is her's whether she succeeds or fails in the suit and her husband, if he succeeds, cannot recover it from her.

The situation in the present case is different from that in *Thorogood* v. *Thorogood*,[1] which is therefore, in any event, distinguishable.

The anomalies in any decision of the present case do not balance one another. On the appellant's contentions there would be grave injustices. On the respondents' contentions no anomaly would result from the fact that normally a case would come to an end and the alimony would expire in less than a year, whereas an applicant's income is to be assessed on a yearly basis. The calculation could be adjusted.

The "ladder" argument of the appellant is too theoretical. The matter could be adjusted by the registrars.

If the appellant were right, a wife with £1,500 alimony would be entitled to litigate free with a nil contribution, whereas legal aid was intended to help people who could not afford to litigate. By contrast, wives receiving voluntary allowances from their husbands would not be eligible for legal aid, nor would a wife receiving an income under a deed of separation. If there were any doubt as to the interpretation of the Act, these instances would indicate that the appellant cannot be right.

In *Moss* v. *Moss*[2] the problem was remote from that in the present case.

Roger Ormrod in reply. This is a pure question of the construction of the Act and the regulations. Section 4 (3) of the Act is simple and plain and should be given its normal meaning. In regulation 2 the words are perfectly plain. Regulation 16 (8) of the general regulations is helpful because all through the scheme a dividing line is drawn at the same place, namely, that which is obtained by litigation or the threat of it and that which is in possession before.

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[1] (1955) The Times, October 20, p. 5.

[2] [1956] P. 373; [1956] 1 All E.R. 291.

In *Thorogood* v. *Thorogood*[3] the £5 a week which the wife was receiving was the subject-matter of the dispute, the dispute being whether or not she was entitled to receive it. To take it into account would have meant taking contributions from moneys which were admittedly not hers. That case must have been rightly decided.

Alimony cannot be a resource available for contributions while yet being too insubstantial to be the subject-matter of the dispute.

The appellant's construction of the Act and regulations yields a logical and coherent scheme. Applied to any other sort of litigation it is also reasonable. Alimony is not to be differentiated from maintenance which is exempted from chargeability. The two should be brought into line.

All the board have is a statement of the applicant's income. They must ignore the subject-matter of the dispute. No one can estimate how long a wife will receive alimony. If it were to be taken as part of her resources for this purpose, there is no way of computing it over a period of 12 months.

The dispute crystallized at the date of the certificate and accordingly alimony cannot be taken into account.

Their Lordships took time for consideration.

December 4. VISCOUNT SIMONDS stated the facts, said that the board assessed the appellant's "disposable income" on the basis of the inclusion in her resources of the alimony ordered to be paid to her and continued: My Lords, the question is whether this sum was rightly included. The appellant contends that it was not, and relies on section 4 (3) of the Act, which provides that the regulations to be made thereunder shall include provision for securing that "the resources of a person seeking or receiving "legal aid shall be treated as not including the subject-matter of "the dispute," and on regulation 2 of the Legal Aid (Assessment of Resources) Regulations, 1950, which is in these terms: "In "computing the rate of income or the amount of capital of the "person concerned, there shall be excluded the value of the "subject-matter of the dispute in respect of which application "has been made for a certificate."

This section and regulation must be interpreted in their context, and I think that it may first be recalled that the Act is

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[3] (1955) The Times, October 20, p. 5.

"an Act to make legal aid and advice in England and Wales ". . . more readily available for persons of small or moderate "means. . . ." Who are "persons of small or moderate "means"? Section 2 (1) enacts that, subject to that part of the Act, legal aid shall be available for any person whose disposable income does not exceed £420 a year, with a provision as to capital which can be ignored, and further enacts by subsection (2) (*c*) that a person receiving legal aid in connexion with any proceedings may be required to make a contribution to the legal aid fund in respect of the sums payable thereout on his account, and (*d*) that any sums recovered by virtue of an order or agreement for costs made in his favour with respect to the legal proceedings shall be paid to the legal aid fund. Section 3 limits the contributions to be made by the legally assisted person, and by subsection (4) provides that, except so far as regulations otherwise provide, any sums remaining unpaid on account of a person's contribution to the legal aid fund in respect of any proceedings and, if the total contribution is less than the net liability of that fund on his account, a sum equal to the deficiency shall be a first charge for the benefit of the legal aid fund on any property (wherever situate) which is recovered or preserved for him in the proceedings. Then comes section 4, to subsection (3) of which I have already referred: the earlier subsections define a person's disposable income by reference to the rate of his income after making certain prescribed deductions and allowances, and provide for the making of regulations as to the manner in which the rate of a person's income is to be computed.

I need not, at this stage, refer to any other sections of the Act nor to the general regulations made thereunder, but it is necessary to look at certain of the Legal Aid (Assessment of Resources) Regulations, 1950, which were made pursuant to section 4 of the Act. By regulation 1 (2) "the period of computation" is defined to mean the period of 12 months next ensuing from the date of the application for a certificate or such other period of 12 months as in the particular circumstances of any case the board may consider to be appropriate. Regulation 2 provides that in computing the rate of income of the person concerned there shall be excluded the value of the subject-matter of the dispute in respect of which application has been made for a certificate: to this I have already referred. Regulation 7 provides for the determination of a person's disposable income in accordance with the schedules to those regulations, and regulation 10 for the redetermination of such income if the circumstances of the person concerned have altered.

Applying these regulations, the board made the assessment and re-assessment of the appellant's disposable income, to which I have already referred, and there is no doubt that they have acted correctly and directed her to make the proper contribution to the legal aid fund if the alimony pendente lite which was payable to her was rightly included in her resources. This is the single question in issue.

The proceedings have taken an unusual course. The President had shortly before the present case was heard by him presided in a Divisional Court in an unreported case of *Thorogood* v. *Thorogood*.[1] That case (I take the facts as he has stated them) was an appeal by the husband from the decision of certain justices on his complaint to reduce the amount of an order in favour of his wife from the maximum amount of £5 a week, with the addition of the maximum sum of 30s. in respect of a child of whom she had been given the custody. The ground of the complaint was that since the date of the order the husband's means had decreased. The magistrates had decided that there was no sufficient change to justify a revision of the order. The wife had been granted a civil aid certificate to resist the appeal, and her disposable income had been computed at £83 per annum. It was clear that this figure could not have been arrived at without taking into account the amount of the order, and upon this the President is reported as saying[2]: "I am sure, and I have "verified my references, that legal aid committees are doing that "which the Act of Parliament expressly forbids them to do, "namely, taking into account in assessing the income the actual "subject of the litigation, namely, the amount of the order; and "that is utterly wrong."

In the present case counsel for the first respondents assured the President that they accepted the correctness of his decision in *Thorogood* v. *Thorogood*.[3] They did so upon the footing that in that case the single matter in dispute was whether the amount of the order should be reduced. But their concession appeared to involve also the general admission that the question of alimony could be part of the "subject-matter of the dispute" within the meaning of the relevant section and regulation. It

[1] (1955) The Times, October 20, p. 5.

[2] [1956] P. 470, 496; [1956] 2 All E.R. 455.

[3] (1955) The Times, October 20, p. 5.

was accordingly left to the President to decide only upon the validity of a further argument which was presented to him to the effect that, the order for alimony pendente lite having been made before the assessment of the appellant's disposable income, the question of such alimony had at the date of assessment ceased to be part of the subject-matter of dispute and, accordingly, the value thereof could properly be taken into account in the computation. The President rejected this argument and made the declaration to which I have already referred.

When the matter came before the Court of Appeal the concession thus made was by leave of the court withdrawn, and counsel for the respondents urged as their primary argument that alimony could not, any more than damages claimed in an action, be "the subject-matter of the dispute." They maintained also the argument in regard to this particular case which had been rejected by the President. The Court of Appeal were unanimous in upholding the respondents' primary argument and I think, though it is not very clear, that they accepted the alternative argument also.

My Lords, I have found great difficulty in this case. It has been said, no doubt justly, by counsel for the appellant, who presented her case with great ability, that any conclusion to which we may come will lead to anomalies. But I must take leave to doubt whether any result could operate more unfairly than that a sum paid by a husband to his wife under a separation agreement or even by way of voluntary allowance should not, but that a sum paid to her as alimony pendente lite should, be excluded from the computation of her resources. And such a result may be thought to be not only unfair but absurd in its incidence, when it is remembered that the very same alimony would undoubtedly have to be included if she sought a certificate to enable her to defend a claim brought against her by a tradesman. In the present case, we are dealing with a modest sum which may well be thought to leave little margin for a contribution to legal expenses, but that is a consideration which would have equal weight whatever the action the wife sought to prosecute or defend. The inescapable fact is that so long as she is in receipt of alimony of £450 per annum, even if she has no other income, she has resources which remove her from the class of persons from whom under the Act no contribution is exigible.

These are considerations which cannot prevail if no other interpretation is permissible than that either a claim for alimony pendente lite or such alimony itself is, at the relevant date, part of the subject-matter of the dispute. But they must be given due weight if an alternative interpretation is open to the court.

My Lords, I have used the words " at the relevant date " and pointed to the alternative " a claim for alimony " or " such " alimony itself " for this reason. The Act, as I have already stated, requires that the regulations to be made under it shall secure that the resources of a person seeking legal aid shall be treated as not including the subject-matter of the dispute: the regulation which is intended to give effect to this requisition provides that in computing the rate of income of the person concerned there shall be excluded the *value* of the subject-matter in respect of which application has been made for a certificate. The regulation by its reference to value emphasizes what is in any event clear, that only that can be either included or excluded to which a value can be attributed, and it appears to me impossible to regard a claim for alimony pendente lite as a resource upon which a value can be put. But at the date of the application, if that is the relevant date for determining what is the subject-matter of the dispute, there is nothing but a claim. There is nothing, therefore, to be excluded from the computation. Equally, no doubt, at the same date there is nothing to be included in the resources. So far I agree with the Court of Appeal. But whether or not the subject-matter of the dispute is finally determined at the date of the application, there is no finality about the determination of disposable income. For regulation 10, to which I have referred, provides for reassessment when circumstances alter. It therefore becomes necessary to ask, when an interim order for alimony has been made, what are then the resources and disposable income of the person concerned. The answer to this question must be that they include the sum payable as alimony, and it must be added that this sum is not, and never has been, the subject-matter of dispute: there is, therefore, no ground for excluding it.

I come, therefore, to the same conclusion as the Court of Appeal in the present case, though I cannot wholly agree with their reasons. In particular, I think it right to say that, in my opinion, the case is clearly distinguishable from *Thorogood's* case.[3] There the single matter of dispute in the proceedings was whether the amount of maintenance under an order already operative should be reduced, and I think that the President was right in saying that it must be excluded. Here at the relevant date, that is, the date of assessment or reassessment, the appellant was indisputably entitled to her alimony pendente lite, and I see no reason either in the language of the Act and relevant regulations, still less upon a broad consideration of their purpose, why it should not be taken into consideration by the board in determining what contribution she ought to make.

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[3] (1955) The Times, October 20, p. 5.

I must allude to one further argument. It is provided by general regulation 16 that, subject to the provisions of paragraph 8 thereof, all moneys payable to an assisted person (inter alia) by virtue of any agreement or order made in connexion with the action, cause or matter to which his certificate relates, whether such agreement be made before or after proceedings are actually begun, shall be paid to the solicitor of the assisted person and dealt with by him as therein provided, but paragraph 8 provides that the regulation shall not apply to (inter alia) payments made under certain sections of the Matrimonial Causes Act, 1950. The result of this is, that in the present case the moneys payable to the appellant by way of alimony would be payable not to her solicitor but to her, and would not be subject to the provisions of the regulation. But paragraph 8 was not in the original regulation: it was introduced at a later date. It was urged, therefore, that the conclusion to which I have come would, but for its introduction, have led to the result that the same sum of alimony would have been both subject to the provisions of regulation 16 and liable to be included in her resources for the determination of her contribution, a result, it was said, which should be avoided, if a different interpretation could avoid it. My Lords, I conceded at an early stage of this opinion that any interpretation might lead to anomalies, and it is possible that, if the regulation had not been amended, this might have been such an anomaly. But the possibility of an anomaly which has been removed cannot alter the clear conclusion to which I have come. Any other conclusion would, in my opinion, lead to far greater ones.

The appeal should, in my opinion, be dismissed, and I move your Lordships accordingly.

LORD MORTON OF HENRYTON. My Lords, section 12 (1) of the Legal Aid and Advice Act, 1949, provides that: "The Lord "Chancellor may make such regulations as appear to him neces-"sary or desirable for giving effect to this Part of this Act or for "preventing abuses thereof." Section 4 (3) of the same Act provides that: "The regulations shall include provision for "securing that the resources of a person seeking or receiving "legal aid shall be treated as not including the subject-matter "of the dispute." The provision made by regulation to secure this result is regulation 2 of the Legal Aid (Assessment of Resources) Regulations, 1950, hereafter referred to as "the "resources regulations," and is as follows: "In computing the "rate of income or the amount of capital of the person concerned, "there shall be excluded the value of the subject-matter of the "dispute in respect of which application has been made for a "certificate."

The facts giving rise to this appeal have already been stated, and I need only refer again to paragraph 8 of the appellant's application for a civil aid certificate on June 14, 1955. Thereby she applied for a civil aid certificate to defend the proceedings for divorce brought against her by her husband and (inter alia) "to claim maintenance from my husband for myself and my "children."

Before the appellant made this application she had applied for and obtained an emergency civil aid certificate, and had applied for alimony pending suit; and shortly after the date of the application, on June 27, 1955, Mr. Registrar Forbes made an interim order against the husband for alimony at the rate of £450 per annum less tax so long as the appellant occupied the matrimonial home, and thereafter at the rate of £650 per annum less tax. After that order had been made the National Assistance Board embarked on the task of computing "the rate of income" of the appellant (who had no capital) under regulation 2 of the resources regulations, and the question for determination on this appeal is whether, in carrying out this computation, the board should have excluded the value of the alimony ordered on June 27, 1955, on the ground that this alimony was "the subject-"matter of the dispute in respect of which application has been "made for a certificate." I say "this alimony" and not "the "*claim* for alimony," because it was only the alimony which was "a resource" of the appellant within section 4 (3) of the Act, and it was only the alimony which could possibly come into the computation of the appellant's rate of income. Whether or not a mere claim for alimony can ever form part of the "resources" with which the Act is concerned, it certainly cannot be a part of the "income" of the person claiming it.

My Lords, in my view it would be incorrect to say that the alimony, which was, in substance, the only "resource" of the appellant, had at any time been the subject of a dispute, and the National Assistance Board rightly refused to exclude its value in computing the rate of income of the appellant. Your Lordships have been informed by counsel that the husband had opposed the application for interim alimony, but the income now in question did not come into existence until that dispute had been determined by the order of the registrar. A dispute, the subject-matter whereof was the alimony of £450 per annum less tax, could only come into existence after the alimony was in existence, and no such dispute has ever arisen, so far as the evidence goes. Certainly no such dispute had arisen at the time when the board computed the rate of income of the appellant.

At this point, my Lords, it is convenient to contrast with the present case the case of *Thorogood* v. *Thorogood*,[3] upon which counsel for the appellant strongly relied. That case was not reported, but the President referred to it in his judgment in the present case, and I quote his words[4]: "Before proceeding "further I must mention one other matter. It appears that the "only authority dealing with the construction of the words "'subject-matter of the dispute' is *Thorogood* v. *Thorogood*,[5] "a case in a Divisional Court of this Division (consisting of "Collingwood J. and myself), heard on October 19, 1955. This "was an appeal by a husband from the decision of the justices "of the North Aylesford Petty Sessional Division of Kent, sitting "at Chatham, on his complaint to reduce the amount of an order "in favour of his wife from the maximum amount of £5 a week, "with the addition of the maximum sum of 30s. in respect of a "child, of whom she had been given the custody. The order "had in 1954 been increased to those figures from the original "amounts of £2 and 10s. respectively (which were the maximum "amounts prevailing at the time when the order was first made "in 1943). The ground of the complaint was that, since the 1954 "order, the husband's means had decreased. The justices had "decided that there was no sufficient change to justify a revision "of the order. The wife had been granted a civil aid certificate "to resist the appeal, and her disposable income had been com"puted at £83. It was quite plain, from the figures under "discussion, that the amount computed as the disposable income "of the wife could not have been arrived at without taking into "account the amount of the order, and I am reported as having "said: 'I am sure, and I have verified my references, that legal "'aid committees are doing that which the Act of Parliament

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[3] (1955) The Times, October 20, p. 5.

[4] [1956] P. 470, 495–496.

[5] (1955) The Times, October 20, p. 5.

" 'expressly forbids them to do, namely, taking into account in " 'assessing the income the actual subject of the litigation, " 'namely, the amount of the order; and that is utterly wrong.' " The President continued: " If those observations were ill-founded " and govern the present case, I ought not to deal with this " application, and I made it clear that I should decline to do so " in those circumstances. However, I was assured categorically, " both by Mr. Winn and Mr. Latey, that my observations were " perfectly correct in connexion with that particular case. " Seeing that the sole question was whether the amount of the " order should be reduced, it is difficult to see how that amount " could well be anything else than 'the subject-matter of the " 'dispute.' It was conceded by both counsel that this was " manifestly so, and that one of the issues in this application " was to establish a distinction between the two cases."

In the Court of Appeal, Denning L.J. did not accept the view expressed by the President in *Thorogood* v. *Thorogood*,[5] and I think it is plain from the judgments of Hodson L.J. and Ormerod J. that they too were unable to accept the President's view, though they did not say so in terms. For my part, I am satisfied that the view expressed by the President in *Thorogood* v. *Thorogood*[5] was entirely correct, but, in my opinion, the last-mentioned case is distinguishable from the present case. I feel no doubt that in a case where an order for alimony or maintenance of a wife is actually in operation, and the husband takes proceedings to reduce the sum payable, or to discharge the order, the income which the wife is receiving by way of alimony or maintenance is the " subject-matter of the " dispute." The only dispute is whether or not the wife is to retain that income or is to lose it wholly or in part. The test suggested by counsel for the respondents, as I understood it, was: " Does the ownership of the 'resource' in question depend " on the result of the proceedings? " I would accept this test, but would insert the words " wholly or in part " after the word " depend," and if the test is applied to the case of *Thorogood* v. *Thorogood*[5] it entirely confirms the view of the President.

On the other hand, if this test is applied to the alimony ordered in the present case, it is, in my view, fatal to the argument for the appellant, because the ownership of that alimony was not being attacked in any proceedings at the time when the rate of income of the appellant was being computed by the board.

Counsel for the appellant relied strongly upon the fact that in regulation 2 " the dispute " is defined as being " the dispute in " respect of which application has been made for a certificate." I have already stated that the appellant, in her application, asked for a civil aid certificate " to claim maintenance," but, in my opinion, that fact does not assist the appellant in this appeal. At the date of the application there could be no " dispute " whereof this income of the appellant was the subject-matter, for the simple reason that this income was not then in existence. Thus, the appellant at that time did not, and could not, apply for a certificate for legal aid in a dispute whereof the subject-matter was this income.

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[5] (1955) The Times, October 20, p. 5.

Counsel on each side suggested that anomalous results would follow from a decision in favour of the other side. These arguments fairly balance each other, in my opinion, and do not lead me to alter the opinion which I have formed on the construction and effect of the Act and the regulations.

For the reasons already stated, which are not the same in every respect as the reasons which moved the Court of Appeal to the same result, I would dismiss the appeal.

LORD TUCKER. My Lords, I agree that this appeal should be dismissed for the reasons which have been stated by my noble and learned friends.

LORD COHEN. My Lords, I have had the opportunity of reading the speech which has been delivered by my noble and learned friend, Viscount Simonds. I agree with his conclusion and the reasons he gives for that conclusion.

Had it not been that in the Court of Appeal Denning L.J. expressed the opinion that *Thorogood* v. *Thorogood* [5] was wrongly decided, I should have been content to say no more; but, in view of that expression of opinion, I desire to add that for the reasons given by my noble and learned friend, Lord Morton of Henryton, I think the opinion expressed by the President in *Thorogood's* case [5] was correct.

I would dismiss the appeal.

LORD KEITH OF AVONHOLM. My Lords, I concur.

Appeal dismissed.

Solicitors: *Kenneth Brown, Baker, Baker; Solicitor to the National Assistance Board; Hempsons.*

F. C.

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[5] (1955) The Times, October 20, p. 5.

[HOUSE OF LORDS.]

H. L. (E.)*

1957
Nov. 20, 21.
1958
Jan. 23.

ESCOIGNE PROPERTIES LTD. . . . APPELLANTS;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

Revenue — Stamp duty — Conveyance or transfer on sale — Company having contracted for purchase of property agrees to re-sell to second company—Conveyance to second company by executors of original vendor when first company beneficial owner of not less than 90 *per cent. of other company's share capital—Whether "the effect" of conveyance to transfer a beneficial interest from one company to another—Whether conveyance executed in pursuance or in connexion with arrangement whereunder beneficial interest had been previously conveyed or transferred—Stamp Act,* 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 54, 58 (4), *Sch. I—Finance Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 28), *s.* 42*—Finance Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 46), *s.* 50.

Statute—Construction—Object of Act—Relevance of specific instances intended to be covered by it.

By section 58 (4) of the Stamp Act, 1891: "Where a person "having contracted for the purchase of any property, but not "having obtained a conveyance thereof, contracts to sell the same "to any other person, and the property is in consequence conveyed "immediately to the sub-purchaser, the conveyance is to be charged "with ad valorem duty in respect of the consideration moving from "the sub-purchaser. . . ."

By section 42 of the Finance Act, 1930: "(1) Stamp duty "under the heading 'Conveyance or Transfer on Sale' in the "First Schedule to the Stamp Act, 1891, shall not be chargeable "on an instrument to which this section applies: . . . (2) This "section applies to any instrument as respects which it is shown ". . .—(*a*) that the effect thereof is to convey or transfer a "beneficial interest in property from one company with limited "liability to another such company; and (*b*) that . . . one of the "companies is beneficial owner of not less than 90 per cent. of "the issued share capital of the other company."

By section 50 (1) of the Finance Act, 1938: "Section 42 "of the Finance Act, 1930, . . . shall not apply . . . unless it is "shown to the satisfaction of the Commissioners of Inland Revenue "that the instrument was not executed in pursuance of or in "connection with an arrangement whereunder—(*a*) the considera- "tion for the transfer or conveyance was to be provided directly or "indirectly by a person other than a company which at the time "of the execution of the instrument was associated with either the "transferor or the transferee; or (*b*) the beneficial interest in the

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW and LORD DENNING.

"property was previously conveyed or transferred directly or "indirectly by such a person as aforesaid."

In 1950 C entered into an agreement to sell certain properties to company No. 1 in consideration of an allotment of shares in that company. The agreement was duly stamped and the shares allotted to C, but no conveyance or transfer of the properties to company No. 1 was executed either by C or, after C's death in 1951, by his executors. In 1954 company No. 1 orally agreed to sell the properties to the appellants, company No. 2, in consideration of an allotment of shares in the appellant company. In November, 1954, at a time when company No. 1 was the beneficial owner of not less than 90 per cent. of company No. 2's issued share capital, C's executors at the direction of company No. 1 executed five instruments conveying or transferring the properties to company No. 2, which duly allotted the agreed number of shares to company No. 1. The instruments were presented to the Inland Revenue Commissioners for adjudication under section 12 of the Stamp Act, 1891. The commissioners were of the opinion that the instruments were within the definition of "conveyance on sale" in section 54 of the Act and were liable to stamp duty under the heading "conveyance or transfer on sale" in the First Schedule to that Act assessed ad valorem, by virtue of section 58 (4) of the Act, upon the value of the shares allotted by the appellant company to company No. 1. They assessed stamp duty accordingly:—

Held, that, whatever was the effect of section 42 of the Act of 1930 on the instruments in question, they were excluded from relief by the provisions of section 50 of the Act of 1938.

Held, further, *per* Lord Keith, Lord Somervell and Lord Denning (Viscount Simonds and Lord Reid not agreeing on this point) that the instruments in question were not exempted by section 42 of the Act of 1930.

Decision of the Court of Appeal [1957] 1 W.L.R. 174; [1957] 1 All E.R. 291 affirmed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Birkett and Romer L.JJ.).

This was an appeal from an order dated December 17, 1956, of the Court of Appeal allowing an appeal by the respondents, the Commissioners of Inland Revenue, from an order dated June 28, 1956, of the Chancery Division (Vaisey J.) in favour of the appellant company, Escoigne Properties Ltd., on a case stated by the respondents under section 13 of the Stamp Act, 1891, for the opinion of the court as to the stamp duty chargeable on five instruments presented to them by the appellant company for adjudication under section 12 of that Act. The question of substance for determination on this appeal was whether those five instruments were exempt from ad valorem stamp duty.

The facts, stated by Viscount Simonds, were as follows: In 1950 the late Samuel Cohen was the owner of a number of freehold and leasehold properties in the counties of London and Middlesex. On June 30 of that year he entered into an agreement with Samuel Cohen (Properties) Ltd., hereafter called "the old company," for the sale to them of such properties subject to the incumbrances then affecting them. The agreement was stamped with a ten shilling stamp and was adjudged duly stamped. The consideration, apart from the liabilities assumed by the old company, was £9,998 to be satisfied by the allotment to Cohen or his nominees of 9,998 fully paid shares of £1 each of the old company. These shares were duly allotted on or about June 30, 1950, but no conveyance or assignment of any of the properties was executed by Cohen. He died on June 21, 1951, and his will was duly proved on February 29, 1952.

On August 26, 1954, the appellant company, Escoigne Properties Ltd., was incorporated with a capital of £10,000 divided into 10,000 shares of £1 each, and shortly thereafter entered into separate bargains with the old company, without there being any written contract, for the purchase of the said properties or some of them for shares of the appellant company. The value of these shares far exceeded their nominal value and were issued at a premium of £10 per share. Five separate instruments were accordingly executed to give effect to these bargains, the executors of Cohen joining in them by the direction of the old company as beneficial owners in order to convey or transfer the still outstanding legal estate or interest to the appellant company. These instruments were then presented for adjudication, the appellant company claiming that they were not liable to any stamp duty under the heading "conveyance or transfer on sale" in Schedule I to the Stamp Act, 1891. Immediately before the execution of these instruments the old company owned not less than 90 per cent. of the issued share capital of the appellant company.

This claim was rejected by the respondents, the Commissioners of Inland Revenue.

John Pennycuick Q.C. and *John Warner* for the appellant company. This case turns on section 58 (4) of the Stamp Act, 1891, and these instruments are not within the subsection. In each instance there was a single instrument which is not to be treated as two instruments.

The effect of the instruments executed was to carry or transfer the beneficial interest in the property from the old company to the new company, and accordingly section 42 of the Finance Act, 1930, applied to them. If that was their effect, the instruments were not so executed that the appellant company was deprived of exemption from stamp duty by section 50 (1) of the Finance Act, 1938. The instruments did not come within section 50, because some of its requirements were not fulfilled. In the first place, there must be an "arrangement," and here there was no "arrangement" within the meaning of the section. In the second place, if there was an arrangement, none of the instruments was executed in pursuance of or in connexion with it. Finally, an arrangement within section 50 must be of a particular character and, even if there was an arrangement here, it had not the requisite character of being one whereunder the beneficial interest in any of the properties affected by the instruments was conveyed or transferred, directly or indirectly, to the company by a stranger, or the consideration for the transfer or conveyance was provided, directly or indirectly, by a stranger.

As to the construction of section 42 (1) (*a*) of the Finance Act, 1930, these transactions come within it. The word "effect" in its ordinary meaning is equivalent to "effective to." The appellants' construction of the material words is the natural one, and each section must be given its natural construction. One must not introduce such words as "substantial" to qualify "effect." They would only introduce uncertainty. But, in any event, the effect here is substantially that for which the appellants contend, since the only substantial effect here produced is to transfer the beneficial interest from the old company to the new company. If the parties had carried out this transaction in any other way duty would admittedly have been payable.

As to the construction of the Stamp Acts, see *Inland Revenue Commissioners* v. *G. Angus & Co.*[1]

Each of the instruments here in question is a single instrument and this is not a case where section 58 (4) of the Act of 1891 applies: see also section 58 (6). There is here only one instrument brought into existence and it cannot be treated as more than one instrument.

If section 42 of the Act of 1930 does not apply to these instruments, duty is chargeable. If it applies, duty is not chargeable. So the only question on this part of the case is whether or not section 42 does apply. If so, it is nihil ad rem that the instruments in question achieve some other result too, besides the material effect of carrying the beneficial interest in the property from the old company to the new company. It is to this that is directed the phrase in section 42 (1) (*a*), "the effect thereof," meaning that the instrument is "effective to" achieve that result. The word "substantial" is wholly uncertain and no meaning can be given to it. The words "only substantial" cannot be written into the Act before "effect."

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[1] (1889) 23 Q.B.D. 579; 5 T.L.R. 697.

In order to produce a disqualification for the exemption from stamp duty given by section 42, section 50 of the Act of 1938 makes the following requirements: (1) There must be an arrangement whereunder a beneficial interest in the property in question is to be conveyed by a stranger. (2) A beneficial interest in the property must be transferred by the stranger under the arrangement. (3) The instrument must be executed in pursuance of or in connexion with the arrangement. The words used are apt to describe only an act done under the terms of the arrangement. But an act is not done under an arrangement if it is done in consequence of an arrangement but not as a term of the arrangement. Here the transfer of the beneficial interest does not occur under the contract, but in consequence of it.

As to the analogy of bankruptcy, see *In re Harvey*.[2] As to the words "directly or indirectly" in section 50 (1) (*a*), see *Potts' Executors* v. *Inland Revenue Commissioners*,[3] where the words were rightly construed. They should be similarly construed here.

The words "conveyed or transferred" in section 50 (1) (*b*) should be construed in their ordinary and natural meaning and do not cover a shifting by operation of law.

As to the word "transferred," see what Vaisey J. said in the present case.[4] Although a beneficial interest may sometimes shift from a vendor to a purchaser by operation of law, that conception is not appropriate in a taxing Act. In fact here there was no express transfer of the beneficial interest by a stranger. The words "transfer or conveyance" here do not apply to a shifting by operation of law. They refer to an instrument whereby one party propels an interest to another. Here there was no such express propulsion.

John Warner following. In order to bring instruments within

[2] (1889) 60 L.T. 710.

[3] [1951] A.C. 443, 455, 457; [1951] 1 T.L.R. 152; [1951] 1 All E.R. 76.

[4] [1956] 1 W.L.R. 980, 988; [1956] 3 All E.R. 33.

the terms of section 50 (1) of the Act of 1938, it must be shown that they have been executed in pursuance of or in connexion with arrangement within the subsection. An arrangement is more complex than a simple agreement: see the definitions in the Oxford English Dictionary. "Arrangement" is an imprecise word and involves something in the nature of a series of transactions. It is not apt to cover a single instrument. Support is also to be found in the definition of "settlement" in section 41 (4) (*b*) of the Act of 1938. A common purpose is what constitutes a series of transactions or an arrangement.

Geoffrey Cross Q.C. and *E. B. Stamp* for the respondents. These were not instruments the effect whereof has been shown to be to convey or transfer a beneficial interest in property from one associated company to another within section 42 (2) of the Act of 1930. The section, on its true construction, only operates to exempt an instrument from such ad valorem stamp duty as it would otherwise attract as an instrument the effect whereof is to transfer a beneficial interest in property from one associated company to another. It does not exempt an instrument from such ad valorem duty as it attracts as a conveyance or transfer by a third party: see reason 4 of the formal reasons in the respondents' printed case. Section 42 should be read as if after the word "applies" there were the words "in respect of the "conveyance or transfer on sale of such a beneficial interest as "is hereinafter mentioned." The object of the section was to deal with cases of the transfer of a beneficial interest from one associated company to another. It was not intended to exempt from ad valorem duty an instrument the effect of which was to convey or transfer the property from a third party to one of those companies in pursuance of or in connexion with a separate contract of sale. The operation of the section should be confined to cases with which it was intended to deal. The phrase used in section 42 (1) (*a*) is "the effect thereof," using the definite article, and that must mean "the substantial effect thereof."

Here the instruments, besides passing the beneficial interests from one company to the other, also completed the agreement of 1950, an independent transaction which would have attracted ad valorem duty and introduced the appellant company as sub-purchaser. The late Samuel Cohen's executors had to be joined as parties to the instruments to vest the legal estate in the appellant company. Thus one effect of the instruments was to get in the legal title, still outstanding in a third party, in completion of the agreement of 1950. The effect of these instruments was not, therefore, that contemplated by section 42.

As to section 50 (1) of the Act of 1938, the onus is on the appellant company to satisfy the commissioners that each of the instruments in question "was not executed in pursuance of or "in connexion with an arrangement" there described.

Here the holding company was incorporated by Cohen and the agreement of 1950 was entered into between him and the company, he agreeing to sell valuable properties to the company in consideration of his receiving shares in the company. He received the shares at once. The company got the enjoyment of the rents of the properties at once. The stamp duty was 10s. because there was no conveyance of the legal estate. It is a fair inference that it was part of the arrangement that the legal estate should be outstanding. The activities of Cohen constituted an "arrangement" within the section whereunder the beneficial interest in the property conveyed or transferred by the instruments now in question was "previously conveyed or transferred" to the holding company by a person who was not an associated company. The beneficial interest had been conveyed or transferred, even though only by a contract and not by a conveyance. If the legal effect of the documents is a transfer, it is fair to say that the property has been transferred. It is fair to assume that Cohen knew what he was about.

It is not intended to invoke section 4 (*a*) of the Act of 1891.

John Pennycuick Q.C. in reply. The words suggested on behalf of the respondents should not be written into section 42 of the Act of 1930. It would be illegitimate to do so unless as a matter of necessary implication.

It was not submitted for the respondents that section 4 (*a*) of the Act of 1891 applies. One is dealing with one instrument only, a conveyance on sale. There is no foundation for suggesting that a conveyance to a sub-purchaser can be treated as two transfers.

Section 42 applies here. There is one instrument which has a certain effect, to transfer the beneficial interest from one company to another. There is a positive enactment that no duty shall be chargeable here.

As to section 50 (1) of the Act of 1938, the words "conveyed "or transferred" should not here be given a different meaning from that which they bear in the whole of the stamp duty legislation. They should be given their literal meaning and not an extended meaning. The words "directly or indirectly" do not widen the meaning of the words "conveyed or transferred." They merely indicate that a conveyance or transfer is within the section if it is either directly or indirectly the act of such a person as is therein mentioned.

Their Lordships took time for consideration.

January 23, 1958. VISCOUNT SIMONDS. My Lords, in my opinion this appeal should be dismissed. The appellant company claim that five instruments, to which I shall refer in greater detail, are not subject to the stamp duty payable on conveyances or transfers on sale. They can only succeed if they establish, first, that the instruments fall within section 42 of the Finance Act, 1930, and, secondly, that they are not excluded from relief by the provisions of section 50 of the Finance Act, 1938. In my opinion, whatever conclusion may be reached on the first point they must fail on the second.

[His Lordship stated the facts and continued:] On a case stated for the opinion of the court their determination was reversed by Vaisey J., but his decision was in turn reversed by the Court of Appeal. The determination therefore stands unless this appeal succeeds.

I must now look at the relevant sections and, first, at section 58 (4) of the Stamp Act, 1891, which provides that "where a "person having contracted for the purchase of any property "but not having obtained a conveyance thereof, contracts to "sell the same to any other person, and the property is in "consequence conveyed immediately to the sub-purchaser, the "conveyance is to be charged with ad valorem duty in respect of "the consideration moving from the sub-purchaser." I refer to this subsection because, apart from the section of the Finance Act, 1930, on which the appellant company relies, each of the instruments in question would clearly be liable to stamp duty under the heading "conveyance or transfer on sale" in Schedule I to the Stamp Act, 1891, and the duty chargeable would be an ad valorem duty in respect of the consideration moving from the appellant company to the old company.

I turn next to section 42 of the Finance Act, 1930, which provides that the stamp duty to which I have referred shall not be chargeable on an instrument to which that section applies, namely to any instruments "as respects which it is shown to

" the satisfaction of the Commissioners of Inland Revenue—
" (*a*) that the effect thereof is to convey or transfer a beneficial
" interest in property from one company with limited liability to
" another such company; and (*b*) that . . . one of the companies
" is beneficial owner of not less than 90 per cent. of the issued
" share capital of the other company." Upon this section the appellant company rely. It is common ground that the second condition is satisfied. Issue is joined on the first.

My Lords, the case for the company can be stated very shortly and simply. Here are instruments prima facie liable to conveyance stamp duty. But they have this operation, that they convey or transfer the beneficial interest in the several properties from the old to the appellant company. I have used the word " operation " but I might as well have used the word " effect " which is found in the section. They are therefore instruments the effect whereof is as stated: the first condition also is therefore satisfied. This contention is countered by the Crown in two or more ways which do not, I think, when analysed, materially differ. The primary argument before the Court of Appeal I take from the judgment of the Master of the Rolls. " There is no doubt," he said,[1] " that the transactions are " within the terms of the subsection if the words ' the effect " ' thereof ' are, as company No. 1 say, equivalent to ' are " ' effective to.' But the Crown, pointing to the definite article, " say that the words signify that the true and real effect or " purpose of the instruments must be the specified result " achieved; in other words, that the phrase ' the effect thereof ' " means ' the substantial effect thereof '." This contention or, I should perhaps say, this way of stating their contention was, if not abandoned, relegated to second place by learned counsel for the Crown on this appeal. But whatever place it takes, I do not see how it can be supported. The language of the statute is clear. It demands nothing more than an answer to the simple question: " Does the instrument have the prescribed " effect? " If it has, then the condition is satisfied. It need not be asked what is the main or real or substantial effect or whether it has any other effect. If such a question were asked, it would often be so difficult to answer that I should hesitate to say that such a test had been laid down by Parliament unless I was driven to it by unambiguous language. So far is this from being the case that the difficulty is only created by an illegitimate introduction of words not to be found in the subsection.

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[1] [1957] 1 W.L.R. 174, 177; [1957] 1 All E.R. 291.

Before I come to what I conceive to be nothing else than another way of stating the same argument, I would remind your Lordships that instruments, not transactions, are liable to stamp duty, that the instruments here in question would be liable to conveyance or transfer duty and (so far as is relevant) to no other duty but for section 42 of the 1930 Act, and that counsel for the Crown rightly disavowed any claim to invoke section 4 (*a*) of the Stamp Act, 1891, under which a single instrument may be deemed for purposes of stamp duty to be several instruments.

I will state the argument in the words of Romer L.J.[2]: "The conveyances and assignments were certainly effectual to "pass the properties company's beneficial interests in the pro-"perties to the appellant company. They achieved, however, in "addition to this, another and different purpose, viz. to com-"plete the contract of 1950 (which would, as an independent "transaction, have attracted ad valorem duty) and to introduce "the appellant company as sub-purchasers. This involved the "joinder of Mr. Cohen's executors as parties to the instruments "and the vesting by them in the appellant company of the legal "estate in the properties. The instruments accordingly had a "dual effect, the conveyance or transfer of a beneficial interest "by one associated company to another and the getting in of the "legal title, in completion of the earlier contract of sale, which "was still outstanding in a third party. By reason of this "composite object of the relevant instruments, and their conse-"quent width and scope, it cannot, therefore, be said, in my "judgment that, 'the effect' thereof was that envisaged by "section 42."

My Lords, no one could fail to be impressed by the cogency of this statement. But I think that, when analysed, it comes to this, that the instruments do not have the prescribed effect because they have some other effect also. In other words, the true construction of the section demands the writing in before "effect" of "main" or "real" or "substantial" or "only." As I have already said, I see no justification for doing so. Nor can I accept the view that it is relevant what other effect the instrument has. It was, I think, conceded that the operation of the section would not be ousted if its further effect was to convey the legal estate outstanding in a trustee third party. It appears to me to be altogether too fine a distinction to say that it is ousted because the legal estate is conveyed in pursuance of some antecedent bargain. And it is, of course, quite irrelevant that, if the parties had carried out the transaction or transactions by a different instrument or instruments, other duties might be exigible.

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[2] [1957] 1 W.L.R. 174, 182.

The argument for the Crown assumed yet another form before this House. Learned counsel referred to the fourth of his formal reasons in the respondents' case and said that that was what he really relied on. I quote it: " Because on its true construction " section 42 operates only to exempt an instrument from such " ad valorem duty as it would otherwise attract as an instrument " the effect whereof is to transfer a beneficial interest in pro- " perty from one associated company to another: it does not " exempt an instrument from such ad valorem duty as it attracts " as a conveyance or transfer on sale by a third party." He expanded this reason by saying that the subsection was to be read as if it ran as follows: " This section applies to any instrument " *in respect of the conveyance or transfer on sale of such a* " *beneficial interest as is hereinafter mentioned* as respects " which . . . ." My Lords, I can see as little justification for writing in these as any other words. I do not think that their inclusion has any different effect from that of writing in any of the adjectives I have indicated before the word " effect." But the argument in this form does serve to expose what is, in my opinion, its flaw. The instrument is ex concessis a single instrument and is not to be deemed anything but a single instrument. As such, it would bear one stamp, the ad valorem conveyance stamp. But the words which it is proposed to write in can only proceed upon the basis that there is one stamp in respect of the conveyance or transfer on sale of the sort of beneficial interest to which the section relates and another stamp in respect of something else: from the former the instrument is free, to the latter it becomes subject. This denies the concession that it is a single instrument subject to one stamp only.

I conclude, then, that the appellants are right on their first contention, but that does not mean that they succeed in this appeal, for they have also to establish that the relief given by the earlier Act is not taken away by section 50 of the Finance Act, 1938. In my opinion, they fail to do this. For under the latter section the relief in question is not given to any instrument " unless it is " shown to the satisfaction of the Commissioners of Inland " Revenue that the instrument was not executed in pursuance of "or in connexion with an arrangement whereunder . . . (*b*) the "beneficial interest in the property was previously conveyed or "transferred directly or indirectly by . . . a person [other than "a company which at the time of the execution of the instrument "was associated with either the transferor or the transferee]," that is to say, by a person who can conveniently be called a stranger, in this case Cohen or his representatives.

My Lords, in my opinion, the commissioners were well justified in not being satisfied that the instruments in question were not executed in pursuance, or in connexion with an arrangement whereunder the ensuing result followed. I do not ignore that they found as a fact that at the date of the 1950 agreement the appellant company was not in contemplation as a sub-purchaser of the property. But I respectfully agree with the Master of the Rolls that it is non-realistic to suppose that Cohen intended that the legal estate should remain outstanding indefinitely in himself or his representatives. The old company was formed very shortly before the contract for sale. The arrangement was thus initiated. It would, I think, be unreasonable to regard the final transaction by which Cohen's executors joined in the instruments in question to convey the legal estate as unconnected with the earlier transactions. The words "or in "connexion with" are wider than "in pursuance of," and appear to me to be well chosen to cover such a series of acts in the law as are to be found here.

It was, however, urged that the section did not apply inasmuch as the beneficial interests in question were not previously conveyed or transferred directly or indirectly by a stranger. I lay no stress on the words "directly or indirectly" but I cannot avoid the conclusion that, when Cohen entered into the 1950 contract and received the consideration therefor, and the beneficial interest in the property accordingly passed to the old company, it was his act by which it passed, and it would be too narrow a construction to say that nevertheless it was not conveyed or transferred by him.

On this ground, I think, the appeal should be dismissed with costs.

Lord Reid. My Lords, I agree with the speech which has just been delivered by my noble and learned friend, Viscount Simonds, but as there is a difference of opinion among your Lordships on the first point, perhaps I ought to state my reasons shortly in my own words. The question turns on the proper interpretation of the words "the effect." There are many contexts in which these words could properly be held to mean "the only effect" or even "the only substantial effect" using the word "substantial" as meaning something which is not negligible. But that interpretation is not possible here. Where a company, which already has the legal title, conveys property to an associated company, section 42 admittedly applies although the conveyance, besides conveying or transferring the beneficial interest, also conveys the legal title and contains covenants which may be of great importance. These other effects are not negligible, but admittedly their presence does not exclude the operation of the section. It appears to me that "an effect" or "the only effect" are the only two possible interpretations of the words "the effect" unless one is to write in qualifying words, which seems to me to be unwarranted. Therefore, as "the only effect" is excluded, I must choose the other possibility, "an effect."

These instruments have a twofold effect; they transfer the beneficial interest from the old company to the appellant, and they convey the legal title from Mr. Cohen's executors to the appellant. Instruments having a twofold effect are dealt with by section 4 of the Stamp Act, 1891: an instrument coming within that section is treated as two separate instruments. Admittedly section 4 cannot be applied to this case but, nevertheless, the respondents are seeking to have the matter decided as if it did, and as if the exemption in respect of one of the effects left the other subject to stamp duty.

Section 42 is plainly a defective section. To cure one defect it was found necessary to pass section 50 of the Finance Act, 1938. I see no reason to strain the language of the section to prevent the emergence of another defect.

Lord Keith of Avonholm. My Lords, I would, if necessary, be prepared to hold that the terms of section 42 of the Finance Act, 1930, do not relieve the appellant from liability to pay ad valorem stamp duty. In any event, I agree that the appellant is caught by the terms of section 50 of the Finance Act, 1938.

My Lords, under section 42 of the Act of 1930 we are concerned only with stamp duty in respect of conveyance or transfer on sale. An instrument which comes into this category may contain other clauses which will attract additional stamp duty under the Schedule to the Stamp Act, but we are not concerned with any such question in this case. The only question under section 42 is whether the instrument here is one the effect whereof is to convey or transfer a beneficial interest in property from one company with limited liability to another such company. Now if one is asked what is the effect of the instrument here it would only be a half answer to say it conveys a beneficial interest in property from one company with limited liability to another such company. It also conveys the legal title to the property from Samuel Cohen's executors to the appellant company. It thus fails in two respects to meet the words of the statute. It introduces a third party, who is neither an agent nor a trustee of the old company, into the instrument of conveyance, and it conveys the legal title as something separate from the beneficial interest. The question, then, is whether such an instrument is within the statutory provision. I have come to the view that the learned Lords Justices of the Court of Appeal were right in holding that it does not. When the facts are considered it is seen that they are not apt to fit *the* effect of the instrument and fit only *an* effect of the instrument, speaking again solely from the point of view of a conveyance or transfer on sale. That is not, I think, sufficient to satisfy the statute. I find some support also for this view on a consideration of the terms of subsections (4) and (6) of section 58 of the Stamp Act, 1891. These subsections show that where an original seller is introduced to complete a sale to a sub-purchaser the legislature is concerned to secure that ad valorem duty is paid on the consideration moving from the sub-purchaser. The transaction embodied in the instrument here is truly, as I see it, a conveyance or transfer from the original seller to a sub-purchaser which attracts duty under subsection (4) of section 58. The instrument of conveyance is not, in my opinion, brought within the exemption in section 42 of the Act of 1930 and duty is therefore payable.

On the questions arising on section 50 of the Act of 1938 I have nothing to add to what has already been said.

I would dismiss the appeal.

LORD SOMERVELL OF HARROW. My Lords, under section 13 of the Stamp Act, 1891, the determination of the court was required on the stamp duty chargeable on five instruments of conveyance and assignment, particulars of which are set out in the case stated.

By an agreement dated June 30, 1950, Samuel Cohen agreed to sell to Samuel Cohen (Properties) Ltd. freehold and leasehold properties (subject to certain incumbrances), which included the subject-matter of the instruments in question. The consideration was to be satisfied by the issue of shares. These shares were allotted but the contract was not completed by any conveyance or transfer. The beneficial interest passed to the purchaser.

Samuel Cohen died on July 21, 1951. In 1954 Escoigne Properties Ltd. was formed and terms were arranged without there being any written contract for the sale to them of the properties in question. The beneficial interest was in Samuel Cohen (Properties) Ltd., the legal estate in the personal representatives of Samuel Cohen. The instruments transfer both these interests to Escoigne Properties Ltd.

The first question is whether these instruments are exempted from stamp duty under the provisions of section 42 of the Finance Act, 1930. If they are so exempted, then is that exemption taken away by section 50 of the Finance Act, 1938?

I can state quite shortly my reasons for agreeing with the Court of Appeal that these instruments were not exempted under section 42 of the Finance Act, 1930.

It is common ground that the agreement of June 30, 1950, did not require an ad valorem stamp either when it was signed or when, the consideration being paid, the equitable interest passed under it to the old company. It is also common ground that, if it had been later completed by a conveyance of the legal estate, that conveyance would have been subject to an ad valorem stamp although the conveyance did not itself pass the interest valued. In other words, the conveyance on completion is stampable in respect of the value and transfer of the equitable interest although that has already been transferred and does not require the conveyance to vest it in the purchaser.

In the present case the conveyance and other instruments come within section 58 (4). But for that subsection, it might have been suggested or held that double duty was payable, first on the completion of the sale to the purchaser and secondly on the completion of the sale to the sub-purchaser although carried out by the same instrument. Both transfers are covered by the one conveyance and the one stamp.

Section 42, in my opinion, relieves an instrument which would otherwise be stampable in respect of the transfer of the equitable interest from one associated company to another. That interest might have already passed under an agreement for sale prior to the instrument of conveyance or transfer. The instrument would be relieved because in such a case, as I have said, the instrument is to be stamped in respect of the value and transfer of the equitable interest, although that has previously passed.

In the present case, therefore, the instruments are stampable in respect of the transfer of the equitable interest as passing from the original vendor to the sub-purchaser. That is the effect of the instrument in relation to stamp duties. It is, therefore, not within the relieving words which must be confined to instruments which attract duty by reason of the transfer from one associated company to another. This attracts duty by reason of the transfer from the original vendor to the sub-purchaser.

If I am wrong about that, then the taxpayer fails under section 50 of the Finance Act, 1938. I think the instruments in question were executed in pursuance of or in connexion with an "arrangement." The onus is on the taxpayer to satisfy the commissioners that they were not so executed. There is the further question referred to by Romer L.J. Was the equitable interest conveyed or transferred by Samuel Cohen? The agreement, it is said, on its face was an agreement to sell under which the property would not pass until completion. Therefore it cannot be said there was a transfer of the equitable interest by Mr. Cohen: it passed by operation of law. I cannot accept this line of reasoning. In some cases the law prescribes the conditions which must be fulfilled for property to pass from vendor to purchaser. Subject to this, parties may make express provision as to the passing of property from vendor to purchaser, or, if no such provision is made, leave it to be dealt with by implication of law. In all cases, however, the transfer is, in my opinion, a transfer by the vendor within the ordinary meaning of these words.

I would dismiss the appeal.

LORD DENNING. My Lords, in order that any of these five instruments should be exempt from stamp duty under section 42, it must be shown that "the effect thereof" is to convey or transfer a beneficial interest from the old company to the new company.

What is the meaning of the words "the effect thereof"? Various interpretations are suggested. Do they mean "the *only* "effect thereof" or "the *substantial* effect thereof" or "*an* "effect thereof"? I do not think they mean any of those things. It is a mistake to dignify these suggestions by calling them "interpretations." They are only substituted words: and as soon as you start substituting words for those used by Parliament, you run into difficulty. If you say that the words "the "effect thereof" mean "the *substantial* effect thereof," you lay yourself open to the criticism that you are writing into the statute qualifying words which are not to be found there. If you say that the words "the effect thereof" mean "*an* effect thereof," you can be accused of altering the words of the statute, which no one has a right to do.

I prefer to start with the proposition affirmed by my noble and learned friend, Lord Reid, in *Goodrich* v. *Paisner*[3]: "No "court is entitled to substitute its words for the words of the "Act." I look upon the suggested interpretations only as attempts to elucidate it. When searching for the meaning of a statute, it is natural to try to put it into your own words—so as to express its meaning as it appears to you. But you must be careful not to write your own words into the statute as if they were part of it. It may well be that no words of yours convey the meaning of Parliament quite so well as the words which Parliament itself has chosen. You can often appreciate the meaning of a section—get the feel of it, so to speak—without being able to translate it into other words with exactly the same meaning. At the conclusion of the argument the function of the court is to apply, not its own words, but the words of the statute to the given situation.

I return, therefore, to the question: What is the true meaning of section 42 as it stands? This cannot be answered by simply looking at the words of the statute and nothing else. A statute is not passed in a vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To arrive at its true meaning, you should know the circumstances with reference to which the words were used: and what was the object, appearing from those circumstances, which Parliament had in view. That was emphasized by Lord Blackburn in *River Wear Commissioners* v. *Adamson*[4] and by the Earl of Halsbury L.C. in *Eastman Photographic Materials Co. Ltd.* v. *Comptroller-General of Patents, Designs and Trade Marks*[5] in passages which are worth reading time and again. But how are the courts to know what were the circumstances with reference to which the words were used? and what was the object which Parliament had in view? especially in these days when there are no preambles or recitals to give guidance. In this country we do not refer to the legislative history of an enactment as they do in the United States of America. We do not look at the explanatory memoranda which preface the Bills before Parliament. We do not have recourse to the pages of Hansard. All that the courts can do is to take judicial notice of the previous state of the law and of other matters generally known to well-informed people. Thus one of the best ways, I find, of understanding a statute is to take some specific instances which, by common consent, are intended to be covered by it. This is especially the case with a Finance Act. I often cannot understand it by simply reading it through. But when an instance is given, it becomes plain. I can say at once: "Yes, that is the sort of thing Parliament intended to "cover." The reason is not far to seek. When the draftsman is drawing the Act, he has in mind particular instances which he wishes to cover. He frames a formula which he hopes will embrace them all with precision. But the formula is as unintelligible as a mathematical formula to anyone except the experts: and even they have to know what the symbols mean. To make it intelligible, you must know the sort of thing Parliament had in mind. So you have to resort to particular instances to gather the meaning.

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[3] [1957] A.C. 65, 88; [1956] 2 All E.R. 176.

[4] (1877) 2 App.Cas. 743, 763–765.

[5] [1898] A.C. 571, 575–576; 14 T.L.R. 527.

I would apply this method to discover the meaning of section 42 of the Finance Act, 1930. Two instances spring to mind which, by common consent, are covered by that section. The first instance is where a company, which is the absolute owner of property, sells it to an associated company in which it holds more than 90 per cent. of the shares. The transfer is effected by a simple conveyance by the one company to the other. Such a conveyance is exempt from stamp duty: because "the effect "thereof" is to transfer the beneficial interest in the property from the one company to the other. The means of achieving that effect is by conveying the legal estate. The second instance is when the one company is not the absolute owner of property but has only equitable interest with the legal estate outstanding in a trustee: and the company then transfers its equitable interest to its associated company. Such a transfer is exempt from stamp duty because "the effect thereof" is to transfer the beneficial interest from the one company to the other. The means of achieving it is by a transfer of the equitable interest.

Those instances show what was the object of section 42. It was to give relief from stamp duty on an instrument by which one company transfers property to its associated company: provided that the association is so close that the transfer is little more than a change in the nominal ownership, with the underlying control remaining the same: and a 90 per cent. shareholding is made the test of closeness.

The object of the statute being thus ascertained, it is plain to my mind that the present instruments do not come within it. None of them is a transfer from one associated company to another. Each is a conveyance of property by a third person—by a seller who had contracted to sell it for value to one of the companies. If it were conveyed by the seller to the original purchasing company, it is clear that stamp duty would be payable on the conveyance. Why should there be any difference when it is conveyed, not to the purchasing company, but to its associated company at its direction? There is no possible reason for Parliament exempting any of these instruments from stamp duty. No one can suppose that it intended to do so. If these instruments do not come within the class of instrument which Parliament had in view—as I am clear they do not—then we should not hold them to be exempt from stamp duty unless the words compel it—and I am clear they do not. I find myself, therefore, in agreement with the Court of Appeal that these instruments are not exempt under section 42.

Even if this view were wrong, there remains section 50 of the Finance Act, 1938. This is a section which I would not be able to understand unless I was first given an instance of what it was intended to cover. Mr. Pennycuick provided this by telling us of the device of the " dummy bridge company " which some people had evolved to avoid paying stamp duty. They took advantage of section 42 by forming a small company which was a puppet in their hands. It was done in this way: If company A wished to sell property to company B for £100,000 and avoid stamp duty, company A would form a small " bridge " company of 100 £1 shares in which it held all the shares. Company A would convey the property to the " bridge " company for £100,000 but the price would be left owing. By reason of section 42 that conveyance would be exempt from stamp duty. Then company A would sell the 100 shares in the " bridge " company to company B for £100: and stamp duty of a trifling amount would be paid on that transfer. The " bridge " company would then convey the property to company B for £100,000 on the terms that the £100,000 should be paid direct to company A. By reason of section 42 no stamp duty would be payable on that conveyance. So the sale from company A to company B was completed without paying any stamp duty on the £100,000. The success of that device was not due to any defect in section 42. It was due to the cleverness of the persons who managed to bring the conveyances within section 42 beyond any doubt.

The object of section 50 was to put a stop to that device: and it succeeded. If anyone were to resort to it after 1938, both conveyances would be liable to stamp duty. The first conveyance would be caught by subsection (1) (*a*). The second by subsection (1) (*b*).

The question is whether section 50 is effective to catch the five instruments in the present case. Romer L.J. thought it was not. He did not think these instruments came within subsection (1) (*b*) because the beneficial interest was not previously transferred " by " Mr. Cohen. All that Mr. Cohen did was to contract to sell the legal interest. The beneficial interest passed by operation of law. That, in a sense, is true. If I were to look at the words of the statute alone and take the word " by " literally, I might be of the same opinion as Romer L.J. But when I look at the mischief which this section was passed to remedy, I come to a different conclusion. The mischief was that some people had resorted to various devices by which they took advantage of section 42 to avoid stamp duty. I do not think the courts should give a narrow construction to section 50 so as to make room for another such device. The word " by " is capable of a wider construction which we should adopt. If these instruments were exempt, it would open the door to widespread avoidance of stamp duty on property deals. All that would be necessary would be to incorporate two puppet companies, make the contract in the name of one and take the conveyance in the name of the other, and no stamp duty would be payable. Faced with this device, I call to mind the resolution of the judges in *Heydon's Case*[6]: " the office of all the judges is always to make " such construction as shall suppress the mischief, and advance " the remedy "; and the words of Lord Selborne L.C. in *Caledonian Railway Co.* v. *North British Railway Co.*[7]: " The more " literal construction ought not to prevail, if . . . it is opposed to " the intentions of the legislature, as apparent by the statute." It is not so much a choice between a literal construction and a

[6] (1584) 3 Co.Rep. 7a, 7b.

[7] (1881) 6 App.Cas. 114, 122.

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liberal construction. It is rather a case of remembering that every statute must be read in the light of the circumstances in which it was made and the object it was passed to achieve. When that is borne in mind, I have no doubt these instruments, if within section 42, are nevertheless caught by section 50.

I would therefore dismiss this appeal.

Appeal dismissed.

Solicitors: *Nicholson, Graham & Jones; Solicitor of Inland Revenue.*

F. C.

[HOUSE OF LORDS.]

INCOME TAX SPECIAL COMMISSIONERS Appellants;

AND

LINSLEYS (ESTABLISHED 1894) LTD. . Respondents.

H. L. (E.)*

1957 Nov. 12, 13, 14, 19, 20

1958 Jan. 23.

Revenue — Profits tax — Investment company — Direction by special commissioners—Computation of company's actual income—Deduction of amount payable by company for profits tax—Whether profits tax "payable" before election—Meaning of "payable"—When tax "falls to be computed"—Finance Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *s.* 31 (3)—*Whether direction required if nil actual income—"Payable"—Finance Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 33), *s.* 68—*Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 262.

Revenue—Surtax—Company.

Section 68 (1) of the Finance Act, 1952, provides: "Where ". . . the actual income from all sources of a body corporate . . . "falls to be computed under paragraph 6 of the First Schedule to "the [Finance Act, 1922] or subsection (3) of section two hundred "and fifty-five of the [Income Tax Act, 1952], then, if any amount "is payable by the body corporate by way of the profits tax or the "excess profits levy, respectively, for any chargeable accounting "period falling wholly or partly within that year or period, a "deduction shall be allowed, in computing the said actual income, "of such an amount as would, after deduction of income tax at the "standard rate in force for the year of assessment during which the "said year or period ends, be equal to so much of the amount so

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* *Present*: Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Somervell of Harrow and Lord Denning.

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"payable by the body corporate as is apportionable to the said year "or period: . . ."

An investment company, to which section 245 of the Income Tax Act, 1952, applied, required the Special Commissioners to make a direction pursuant to section 262 of that Act in respect of the company's income for the period April 6 to May 7, 1953. The Special Commissioners refused to make a direction on the ground that when the actual income of the company was computed, including a deduction in respect of the company's liability to profits tax, to which it had been assessed, a nil sum resulted and that there was no obligation upon them to make a direction in respect of a nil actual income. The company claimed to be entitled to require an order of mandamus to issue to the Special Commissioners requiring them to make a direction. In that event it would escape payment of £16,421 profits tax by electing to pay surtax on a sum not exceeding £8,920:—

Held, that profits tax, having been assessed, was "payable" within the meaning of section 68 (1) of the Act of 1952 notwithstanding that no profits tax would ultimately be payable if, after a direction under section 262, and a consequent apportionment, an election was made under section 31 (3) of the Finance Act, 1947. A pending appeal to the House of Lords against that assessment to profits tax could be disregarded in this respect, since it only raised again the same question now before the House, and must fail if the present appeal was allowed. Accordingly, the Special Commissioners were not obliged to make the direction, since a necessary preliminary to a direction and apportionment was the computation of the company's actual income from all sources and, in computing it, a deduction must be made in respect of any profits tax payable by the company during the relevant period. There was no obligation to make a direction in respect of non-existent income and no possibility of "apportioning" nothing. Therefore there was no right to an order of mandamus.

Per Lord Denning. The making of an election was not a condition precedent to the profits tax being payable, but a condition defeasant.

Dicta of Lord Dunedin in *Whitney* v. *Inland Revenue Commissioners* [1926] A.C. 37, 52; 42 T.L.R. 58, and of Lord Porter and Lord Morton of Henryton in *Inland Revenue Commissioners* v. *John Dow Stuart Ltd.* [1950] A.C. 149, 163, 169–170; [1950] 1 All E.R. 1 applied.

Decision of the Court of Appeal sub nom. *Reg.* v. *Income Tax Special Commissioners; ex parte Linsleys* (*Established 1894*) *Ltd.* [1957] 2 Q.B. 78; [1957] 2 All E.R. 167 reversed.

APPEAL from the Court of Appeal (Jenkins, Hodson and Sellers L.JJ.).

This was an appeal from an order of the Court of Appeal made on March 6, 1957, dismissing the appeal of the appellants, the Commissioners for the Special Purposes of the Income Tax

Acts, from an order of the Divisional Court of the Queen's Bench Division (Lord Goddard C.J., Hallett and Donovan JJ.) made on October 19, 1956, whereby it was ordered that the commissioners should forthwith, and they were commanded to, give a direction under sections 245 and 262 of the Income Tax Act, 1952, in respect of the period from April 6, 1953, to May 7, 1953 (both inclusive), in relation to the respondent company, Linsleys (Established 1894) Ltd. (the applicants), and that the respondents' costs of the motion be paid by the appellants to the respondents, such costs to be taxed; and it was further ordered that the proceedings therein be stayed for 14 days from the date of the order and that if within that time the appellants gave notice of appeal and entered the same, then the proceedings be further stayed until the determination of the appeal.

The facts, stated by Lord Reid, were as follows: The respondent, hereinafter called "the company," was at all material times under the control of not more than five persons of whom some, but not all, were individuals. Until 1952 the company carried on trade as beer, wine and spirit merchants, but on April 1 of that year it sold its business. Thereafter it was an investment company. On May 7, 1953, it went into voluntary liquidation. In respect of its last chargeable accounting period from April 1 to May 7, 1953, the company was assessed to profits tax in the sum of £18,987, mainly on account of distribution charges in respect of assets distributed in the liquidation. If no account were taken of this assessment, its actual income for the period April 5 to May 7, 1953, was not more than £8,920. If this assessed amount of profits tax were treated as an expense, its actual income for that period was nil, being arithmetically a minus quantity. In this action the company sought an order of mandamus against the appellants, the Special Commissioners; and by a judgment of the Divisional Court, affirmed by the Court of Appeal, the Special Commissioners were ordered to give a direction under sections 245 and 262 of the Income Tax Act, 1952, in respect of the period April 6 to May 7, 1953. The present appeal was brought against that order. The result of that order would be that the company would not be bound to pay that part of the profits tax attributable to that period, i.e., £16,421, but that the actual income of the company, i.e., £8,920, or such less sum as might ultimately be determined, would be deemed to be the income of its members, so that surtax would be payable in respect of what would be apportioned to individual members and other additional tax would be payable in respect of the part apportioned to corporate members of the company.

Sir Reginald Manningham-Buller Q.C., A.-G., and *E. B. Stamp* for the appellants. This case involves consideration of the relationship between the statutory provisions dealing with the profits tax code and those dealing with the cases where a company's income is to be treated as income of the members for surtax purposes. The chargeable accounting period of the company was from April 1 to March 31. As the liquidation was on May 7, 1953, the last chargeable accounting period was from April 1, 1953, to May 7, 1953.

By section 30 (2) of the Finance Act, 1947, relief (called "non-distribution relief") was provided by way of reduction of the rate of profits tax on so much of the taxable profit as was not covered by the "net relevant distributions to proprietors" (ascertained in a specified way). Thus the full burden could be avoided by delaying distribution to a subsequent year. By section 30 (3) it was provided that if, in the case of a trade or business, the net relevant distributions for any chargeable accounting period were greater than the profits thereof for that period, there should be charged for that period, in addition to any other profits tax, profits tax on the amount of the difference, provided that a greater amount of such excess should not be taxed under the subsection than the amount which previously escaped tax by reason of non-distribution relief in an earlier period. These additional charges were called "distribution charges" and were in fact payment of relief accrued in earlier years.

Thus the £18,987 assessed on the company in respect of the period from April 1, 1953, to May 7, 1953, represented distribution charges, or relief secured through non-distribution in earlier years.

If this had been an ordinary company, no question would have arisen, but on the ground that not more than five persons controlled it and it was an investment company to which section 245 of the Income Tax Act, 1952, applied, it was claimed that it could escape payment of the sum which it would have had to pay if distribution had been made in earlier years. This was sought to be achieved by the company surtax provisions. Ever since 1922 Parliament has made special provision for companies controlled by not more than five persons: see section 21 of the Finance Act, 1922, section 20 (1) and (3) of the Finance Act, 1936, and section 14 of the Finance Act, 1939.

National defence contribution (later profits tax) started in 1937, and by section 25 (1) of the Finance Act, 1937, it was to be deducted as an expense in computing profits and gains for income tax purposes. It was clear from the start that the amount "payable" must be ascertained before the amount of income was finally determined. Profits tax must be deducted in order to arrive at income tax.

Section 245 of the Income Tax Act, 1952 (replacing section 21 of the Finance Act, 1922), deals with the power to direct that the income of certain bodies corporate (defined by section 256) is to be deemed to be the income of their members. The section refers to "actual income," and that must be income after deducting profits tax: see section 141 (3). The actual income is to be apportioned, and that would be very hard if it included profits tax liability.

Since the amount of profits tax liability must be deducted as an expense from the company's income under section 141, it had no income for the period in question and so could not come within the words of section 257 of the Act of 1952 defining investment companies.

The application for mandamus is based on section 261 (1) and on the ground that the company was within section 256 and that its income during the relevant period was investment income; the subsection, it is said, is mandatory. For the Crown it is contended that the amount of the profits tax assessment was £18,987 and the amount of the company's receipts was not more than £8,920, and that, the former being allowed as a deduction, the company had no actual income for the relevant period, so that section 262 and section 245 cannot apply. That is the position under the Income Tax Act, 1952, and the Finance Act, 1952, makes no real difference.

If, as here, there is a nil income, one cannot divide nought, for, if there is no income, there can be no increase of the surtax liability of the members of the company. It would be strange if Parliament had placed on the commissioners the duty of doing what is now suggested when the whole object of the provisions relied on was to prevent the avoidance of the payment of surtax. Before one can determine whether section 262 applies, the company's income must be ascertained.

The Finance Act, 1952, made some important changes in the law. By section 33 profits tax was no longer deductible for income tax purposes. But section 68 (1), dealing with the case of companies such as this, has the effect of relieving the members of such companies from paying surtax on that income paid for income tax on the amount of profits tax liability. Section 68 (2) amends the proviso to section 262 (2) (*a*). So, although by section 33 profits tax is no longer deductible for income tax purposes, it must still be deducted (or grossed up) for the purposes of the company surtax provisions. It would be unfair if members of a company within section 245 or section 262 were compelled to pay surtax on amounts which were paid in profits tax and which they never received. Yet that would be the effect of the decision of the Court of Appeal. As to the repeal of section 141 of the Income Tax Act, 1952, see section 76 (8) and Schedule XIV of the Finance Act, 1952.

The importance to the respondent company of getting a direction under section 262 arises from the provisions in section 31 (1) (2) and (3) of the Finance Act, 1947, exempting individuals and partnerships of individuals from profits tax. The effect of that section would be that if, by virtue of an order of mandamus, a direction were obtained in relation to the period in question and that direction were followed by apportionment, the right of election would arise, that right being exercisable by the corporate body jointly with the non-individual members. The effect of election would be that the respondent company would not be chargeable to profits tax, that is, would avoid paying the £16,421 and by election for the year 1952–53 would avoid paying the £18,987. The effect would also be a division of profits and losses among those to whom apportionments were made. The income, £8,920, would be divided and the profits tax liability would be extinguished, the members paying surtax on a sum not exceeding £8,920.

There is only a contingent right of election arising if the anterior conditions are fulfilled.

As to the stages in the imposition of a tax, see *Whitney* v. *Inland Revenue Commissioners*.[1] As to the meaning of "actual "income," see *Thomas Fattorini* (*Lancashire*) *Ltd.* v. *Inland Revenue Commissioners*.[2]

The right order is not first to make a direction and then to compute the income. In cases of a direction under section 245 of the Income Tax Act, 1952, one must first ascertain in relation to the company whether a "reasonable part of its actual income" has been distributed, and in order to do that one must first ascertain the whole income. Further, in order to be an investment company, a company's income must consist mainly of investment income (see section 257 (2)), and so, if there is no actual income, it is not an investment company for the purposes of these sections. The expression the " whole of the actual income " in section 262 (1) imports that there must be an actual income before a direction can be made, and it must be determined whether all or part of the income is estate or trading income: see section 262 (3) and (4). So, alike under sections 245 and 262, computation of income must precede and not follow direction.

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[1] [1926] A.C. 37, 52; 42 T.L.R. 58.

[2] [1940] 3 All E.R. 657, 660; (H.L.) [1942] A.C. 643, 657–658; [1942] 1 All E.R. 619.

On the view of the courts below, section 262 (2) of the Income Tax Act, 1952, and section 68 of the Finance Act, 1952, would never apply, for section 31 (2), (3) and (4) of the Act of 1947 would apply to every possible class of company to which section 262 applied. Surtax payers would lose an advantage which Parliament intended them to have. If there is no deduction before apportionment, there is no machinery for rectifying apportionment. In section 68 (1) the word " payable " covers both profits tax and excess profits levy and has the same meaning in relation to each. Section 68 (4) shows that the word is equivalent to liability based on current assessments for the chargeable accounting period. The word " payable " may have different meanings according to the context. The reference to excess profits levy in section 68 shows that there it means the amount for which the company is liable at the moment of computation; so, too, in the case of profits tax. In relation to section 262 of the Income Tax Act, 1952, the moment is before direction; see also sections 19, 24 (1) and Schedule V, paragraph 1, of the Finance Act, 1937. The profits tax is now " payable " within section 68 because the distributions made by the respondents in liquidation attracted profits tax under section 30 (3) of the Act of 1947 and the amount has been particularized by an assessment.

There are six years in which to apportion and assess for surtax under section 245. It may be done in year 6. The question arises: Can a company in year 1 appeal against an assessment to profits tax on the ground that at any time within the next five years there may be an apportionment and election and that the tax is consequently not payable in year 1? As matters stand, there is liability to profits tax and the assessment would be valid; the tax must be paid notwithstanding that in certain contingencies the liability may be terminated. There would be a present liability to pay profits tax and it is payable down to the date of election, so that an appeal against assessment would be out of place. There is no difference between cases where there "may" be a direction and there "must" be a direction. In neither case "must" there be an election. Profits tax is payable notwithstanding there may be an apportionment. It is not the apportionment which destroys the liability but the subsequent election. The direction and apportionment proceed on the amount payable at the time of computation.

It was not the intention of the legislature to give the company and its corporate members the choice of paying profits tax or of escaping it by casting an increased surtax liability on its members. The object of the relevant provisions was to deter distribution. There can be an election to escape profits tax only where there is in fact a liability to surtax.

Under section 245 before giving a direction the Special Commissioners must know the actual income and when it was distributed; therefore the income falls to be computed before they can give a direction. Again, under section 262 there must be "actual income" before direction and it must be known to what extent it is estate or trading income, so that there the income falls to be computed before direction.

Before the Finance Act, 1952, the deduction of profits tax was a necessary condition precedent to the determination of income tax and other liabilities. Since then profits tax and income tax are ordinarily assessed independently, but section 68 requires profits tax to be deducted in company surtax cases.

Although it is contended that actual income falls to be determined before direction, it is sufficient for the appellants' purposes if it is to be computed after direction but before apportionment. Whenever it is computed, the profits tax payable must be deducted.

Profits tax is payable within the meaning of section 68 (1) and will cease to be payable on the happening of a certain event, that is, election. If that does not happen, it remains payable. The situation is not that it will only become payable on a certain event not happening. In the same way a vested interest does not cease to be so because it is liable to be divested on the happening of a future event. If, by reason of an apportionment, profits tax ceases to be payable, the amount deducted in respect of it can be covered by an additional apportionment.

If it be contended that the profits tax is not payable because the company has appealed against the profits tax assessment, the answer is that the commissioners cannot compute the actual income until the appeal is determined and so cannot be compelled to apportion before that.

The liability is not contingent any more than was the liability in *Inland Revenue Commissioners* v. *John Dow Stuart Ltd.*[3] The reasoning of that decision supports the appellants' submissions.

If the actual income of a company is nil, there can be no direction, no apportionment and no liability to surtax. Whatever is apportioned is deemed by statute to be the income of the members. There is no machinery by which that can be reversed. What has once been deemed to be the income of the members cannot be undeemed. If a company's total income were £2,000 and the profits tax £500, the income for income tax purposes would be £1,500. In those circumstances there should be an apportionment of £1,500, and afterwards if, and only if, there were an election, there should be an additional apportionment of £500. It would be wrong to apportion the whole £2,000 on the ground that election might destroy liability to profits tax.

The respondents want the House of Lords to shut their eyes to section 68 (1) and (2) of the Finance Act, 1952. If they are right, it could never apply. But the appellants have given effect to it as Parliament required.

In summary, a necessary preliminary to a direction and apportionment is the computation of the company's actual income within section 262 (1) of the Income Tax Act, 1952. In that computation any profits tax payable by this company for the relevant period, " grossed up " in accordance with section 68 of the Finance Act, 1952, must be deducted. The amount of the profits tax so payable is £16,421 and the gross sum to be deducted is £29,856. When this is deducted, the company's actual income is reduced to nil. There is no obligation under section 262 to make a direction in regard to non-existent income, and nought cannot be " apportioned." Thus section 262 (1) imposes on the appellants no duty for the relevant period.

E. B. Stamp following. It is no doubt anomalous that if the actual income is £1, there must be a surtax direction resulting in relief from profits tax, while if the actual income is nil, there can be no direction and no relief. But no point can be made against us on this, because, depending on the figures, the same anomaly will arise whether or not you ought to deduct profits tax in making the surtax direction. Profits tax must be " payable " notwithstanding that a direction may ultimately fall to be given. Otherwise a trading company could, arguing that it had not become payable, resist payment of profits tax until the time for making a surtax direction six years later had expired, when it would be too late to make a profits tax assessment.

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[3] 1948 S.C. 686, 693, 696; 31 T.C. 274, 280, 283; [1950] A.C. 149, 159–160, 161, 163, 166–167, 182.

Cyril King Q.C. and *Hubert Monroe* for the respondent company. The courts below were right. The appellants have no discretion in this matter and the provisions relied on by the respondent company are mandatory that the apportionment must be made as between all the members of the company. No charge is laid on by the apportionment. There is a right of appeal against apportionment involving considerations of the accuracy of the actual income which has been apportioned: see *Inland Revenue Commissioners* v. *Kered Ltd. Same* v. *Sigma Trust Ltd. Same* v. *Willant Trust Ltd.*[4] After apportionment the last step is assessment which imposes the charge to surtax.

In relation to profits tax the first thing to be done is for the company to determine whether to avail itself of the right of election given by section 31 (3) of the Finance Act, 1947. If it is so decided, no deduction need be made in respect of profits tax in the calculation of the actual income, but otherwise the amount of the profits tax is vital in finding out what is the amount of the actual income. In section 35 of the Finance (No. 2) Act, 1945, dealing with relief for deficiencies of profits in relation to excess profits tax and national defence contribution, there is no time limit.

Profits tax is " payable " if it becomes finally payable in the last resort, having regard to the relevant sections of the whole tax code. The sum of £16,421 profits tax is not here " payable " within section 68 of the Finance Act, 1952, which is only designed to apply to a certain group of persons. The language of that section leaves in abeyance the question whether or not profits tax is payable, and profits tax is not payable within that section unless the amount thereof has been finally determined and must ultimately be paid. Among the relevant sections of the taxing statutes, which must be considered in determining that, is section 31 of the Finance Act, 1947. No profits tax is ever payable by the company if after a direction under section 262 of the Income Tax Act, 1952, and a consequent apportionment, the company and the corporate members thereof exercise their right of election under section 31. By refusing to give a direction the appellants

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[4] [1939] 1 K.B. 402; [1939] 1 All E.R. 45.

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have deprived the respondent company and its members who are not individuals of their statutory right to elect whether for the period in question the company shall be chargeable to profits tax, since that right of election can follow only on a direction. Further, in the present case the profits tax assessments are still under appeal, and accordingly they are not final and the tax is not payable.

There is no provision in the legislation enabling profits tax paid to be recovered if, at a later stage, it is found not to have been payable.

As to the computation of " actual income," see section 255 (3) of the Income Tax Act, 1952, in relation to surtax directions on undistributed income. During the period in question the respondent company had an actual income from all sources.

Even if a deduction in respect of profits tax falls to be made, the commissioners are not absolved from the performance of their statutory duty to give a direction on the ground that the effect of the deduction would be to reduce the actual income of the company to nil. Notwithstanding this, the statutory provisions require the making of a direction.

As to what Lord Dunedin said in *Whitney* v. *Inland Revenue Commissioners*,[5] and also the decision in *Inland Revenue Commissioners* v. *John Dow Stuart Ltd.*,[6] see the judgment of the Court of Appeal in the present case.[7] The court did not consider that it followed that where the legislation charging a tax gave taxpayers a right of election which, if exercised, would exempt them from liability for the tax, references in the legislation to the tax as " payable " were to be taken as meaning that the tax must be treated as payable, notwithstanding the existence of the right of election.

One must not be startled by the anomalies thrown up by these enactments in any view of the matter, but those inherent in the Crown's submissions are striking. Thus, if the amount of the profits tax is to be deducted in computing the income apportioned, and afterwards, because of the apportionment, profits tax ceases to be payable, the sum deducted would be retained by the company unapportioned and would not be chargeable to surtax. Further, on the Crown's submissions, if the profits tax was less than the company's actual income, even by a very small sum, the whole of the actual income would be treated on a surtax basis and no profits tax could be demanded, assuming that the right

[5] [1926] A.C. 37, 52.

[6] [1950] A.C. 149.

[7] [1957] 2 Q.B. 78, 105; [1957] 2 All E.R. 167.

to election is exercised or that it is a case under section 31 (2); but if the profits tax was greater than the company's actual income, even by a little, the whole would have to be handed over as profits tax.

Hubert Monroe following. The problem is to fit section 68 of the Finance Act, 1952, into a logical scheme with section 31 of the Finance Act, 1947. Section 68 applies to companies on which a direction and apportionment are being made for surtax purposes. So, prima facie, the company is liable to income tax, profits tax and surtax. So far as income tax is concerned, the assessment may be on the profits of a trade, or, in the case of an investment company, the income tax may be deducted at source. Until 1952, in computing under Schedule D the income tax liability of a trading company, profits tax was a deduction, but section 33 of the Finance Act, 1952, altered the practice, arriving at the same result in a different way. That has no bearing on section 68 of the Act, which is concerned with a different problem, the computation of the actual income of a company from all sources. In the case of investment companies it preserves the previous position with a variation in that it allows the deduction of grossed-up profits tax. The purpose and effect of the section is to give a measure of relief from double taxation, since, but for that, taxation might exceed 20s. in the pound. The relief granted under this section is to be contrasted with that under section 31 of the Act of 1947.

Profits tax is payable in respect of a particular chargeable accounting period when all the circumstances relevant to that particular period are known. Where there is a true condition subsequent, the Finance Acts provide machinery for dealing with it. The fact that none is provided here shows that the right of election is not a true condition subsequent. There is nothing unusual in postponing the actual assessment of tax payable. The imposition of liability is the horse which draws the cart after it, the amount. The horse must go before the cart. There is no difficulty in the respondent company's contentions which cannot be adjusted by the machinery provided by the Acts.

Their Lordships took time for consideration.

January 23, 1958. VISCOUNT SIMONDS. My Lords, I have had the advantage of reading the opinion which my noble and learned friend, Lord Reid, is about to deliver, and I agree so fully in his reasoning and conclusions that I do not think it necessary to add anything. In accordance with it, I move that the appeal be allowed and the appropriate declaration made; the respondents must pay the appellants' costs in the Divisional Court; each party will bear their own costs in the Court of Appeal and this House.

LORD MORTON OF HENRYTON. My Lords, I have had the privilege of reading in print the opinion which is about to be delivered by my noble and learned friend, Lord Reid. That opinion sets out fully the facts leading up to this appeal, and the relevant statutory provisions, and I agree with it; but as your Lordships are differing from the unanimous conclusion of the Court of Appeal and of the Divisional Court, I shall state shortly, in my own words, my reasons for thinking that the appeal should be allowed.

For the purpose of stating the respective contentions of the parties, I borrow, with only trifling alterations, the language of Donovan J. in delivering the judgment of the Divisional Court.[1]

Counsel for the Crown contend that the Special Commissioners are not obliged to give a direction under section 262 (1) of the Income Tax Act, 1952, followed by an apportionment, because (1) a necessary preliminary to a direction and apportionment is the computation of the respondent company's actual income from all sources in accordance with the terms of section 255 (3) of the same Act; (2) in computing that income, any profits tax payable by the company for the relevant period (April 6 to May 7, 1953) "grossed-up" in accordance with section 68 of the Finance Act, 1952, must be deducted under the mandatory provisions of the same section; (3) the amount of the profits tax so payable is £16,421, and the gross sum to be deducted is £29,856; (4) when this sum is deducted, the result is that the actual income from all sources of the company for the relevant period is reduced to nil; (5) there is no obligation under section 262 to make a direction in regard to non-existent income and no possibility of "apportioning" nothing; (6) therefore section 262 (1) imposes no duty upon the Special Commissioners for the relevant period.

Counsel for the company attack the third stage in this reasoning. They submit that the sum there mentioned is not "payable" within the meaning of section 68 of the Finance Act, 1952, because profits tax is not "payable" within the meaning

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[1] [1957] 2 Q.B. 78, 85; [1956] 3 All E.R. 577.

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of that section unless the amount thereof has been finally determined and must ultimately be payable, having regard to all relevant sections of the taxing statutes, including section 31 of the Finance Act, 1947; and no profits tax will ever be payable by the company if, after a direction under section 262 of the Income Tax Act, 1952, and a consequent apportionment, the company and the corporate member thereof exercise their right to " elect " under section 31 (3) of the Finance Act, 1947.

To this argument counsel for the Crown reply that profits tax is now " payable " within the meaning of section 68 of the Finance Act, 1952, because the distributions made by the company in liquidation attracted profits tax under the charge imposed by section 30 (3) of the Finance Act, 1947; and the amount of tax payable has been particularized by an assessment made upon the company. Thus the decision of this appeal turns upon the question whether this sum of tax is or is not " payable," within the meaning of section 68 of the Finance Act, 1952, in the circumstances of the present case.

My Lords, I express no opinion upon the question whether a particular sum of profits tax can be said to be " payable " within the meaning of section 68 before there has been an assessment, but in the present case I am of opinion that the contentions of counsel for the Crown are well founded. In the case of an investment company, to which section 262 of the Income Tax Act, 1952, applies, it may not be necessary for the Special Commissioners to make any computation of the actual income from all sources of the company before giving a direction, because the direction is to be given under section 262 (1) " without considering whether or not the company has distributed a reasonable part of its said income." To this extent the position under section 262 differs from the position under section 245; but it seems to me impossible for the commissioners to apportion the actual income from all sources of the company among the members of the company without first computing what that actual income is. This computation must be carried out in accordance with the provisions of section 255 (3) of the Income Tax Act, 1952, and section 68 of the Finance Act, 1952, and no election under section 31 (3) of the Act of 1947 can take place until there has been an apportionment of the income. Thus the order of events is first, computation, secondly, apportionment, and thirdly, election, and, in my view, the provisions of section 68 compel the commissioners to deduct, at the first stage, the sum of £29,856 already mentioned. The reasons which lead me to this result are as follows:

(a) This sum has already been assessed upon the company and is, I think, " payable " in any ordinary sense of the word. This view is supported by the observations of Lord Dunedin in *Whitney* v. *Inland Revenue Commissioners* [2] and by members of your Lordships' House in *Inland Revenue Commissioners* v. *John Dow Stuart Ltd.*[3]

(b) The words " the amount payable " appear in subsection (4) (*a*) of the same section 68 and in that subsection the word " payable " cannot mean " finally determined," because it is contemplated that the amount " payable " may be reduced by reason of a deficiency of profits for a subsequent period. It seems to me that the same meaning should be given to the word " payable " in subsections (1) and (4). If so, the possibility of a subsequent election under section 31 (3) of the Act of 1947 would not relieve the commissioners from the duty to deduct the sum now in question in accordance with section 68 (1) of the Act of 1952.

(c) The contention of counsel for the company would result in section 68 (1) having a very limited application, whereas it appears to me to be intended to be a general relieving section for the benefit of the taxpayer.

(d) It might well happen in many cases that the company would have paid the sum assessed by way of profits tax before the commissioners came to make their computation under section 68, and it would seem strange if a sum which had actually been paid, and properly paid, should be held not to be " payable " within the meaning of the section.

(e) Although both sides could point to certain anomalous results if their contention were rejected, the most striking anomaly arises from the argument on behalf of the respondent company. For if that argument were correct, an investment company having an investment income of (e.g.) £10, and being liable for profits tax amounting to a very large sum, could get rid of the liability for profits tax by insisting upon a direction being given by the commissioners under section 262 (1), followed by an apportionment of the £10, thus bringing into effect the provisions of section 31 (2) or 31 (3) of the Finance Act, 1947.

I have not overlooked the fact that an appeal against the relevant assessment to profits tax is still pending, but that appeal only raises again the question which is now before this House. I agree with my noble and learned friend, Lord Reid, in thinking that in these circumstances the fact that this appeal is still pending can be disregarded, and I join with him in refraining from expressing any opinion on a case in which the assessment is attacked on some other ground.

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[2] [1926] A.C. 37, 52; 42 T.L.R. 58.

[3] [1950] A.C. 149, 163, 169–170; [1950] 1 All E.R. 1.

I agree with the motion proposed by my noble and learned friend on the Woolsack.

Lord Reid, having stated the facts, continued: My Lords, the difficulty in this case arises from the interrelation of provisions by which the income of certain companies can be deemed to be the income of their members, beginning with section 21 of the Finance Act, 1922, and provisions dealing with profits tax which began as the national defence contribution in the Finance Act, 1937. Under the Act of 1922, if it appeared to the Special Commissioners that a company to which these provisions applied had not distributed a reasonable part of its actual income (i.e., its income for the year in question estimated on income tax principles), they could direct that the company's actual income should be deemed to be the income of its members and apportion that income among the members. As a result surtax (then super-tax) had to be paid by the company on the whole of the company's actual income at rates at which its members would pay the surtax, although the income had not been distributed to the members. Then the Finance Act, 1939, made even more stringent provisions regarding certain investment companies: section 14 (1) required the Special Commissioners to give such a direction whereby the whole actual income of such companies (subject to special provisions for any part of it which might be estate or trading income) was deemed to be the income of the members whether or not a reasonable part had been distributed.

The Finance Act, 1937, s. 19, charged national defence contribution on profits in each chargeable accounting period from trade or business and included investment companies within the scope of the charge. But by section 25 it allowed national defence contribution to be deducted as an expense in computing profits for income tax purposes. By the Finance Act, 1947, extensive alterations were made. This tax had been renamed profits tax; the rate was increased to 25 per cent.; and provision was made for non-distribution relief and for a distribution charge when profits which had enjoyed that relief were ultimately distributed. Moreover, individuals and partnerships were relieved from this tax which thereafter only applied to companies and corporate bodies. The provision which allowed national defence contribution to be deducted as an expense for income tax purposes remained in force for profits tax. The previous enactments dealing with income tax were consolidated in the Income Tax Act, 1952. Thereafter further amendments were made by the Finance Act, 1952, whereby, in the general case, profits tax was no longer allowed to be deducted as an expense in computing income for income tax purposes; but special provision was made to permit deduction of profits tax in cases where directions were to be given by the Special Commissioners.

The difficulty which arises in the present case can only arise if profits tax payable by an investment company in respect of a particular period exceeds the profits of the company for that period. That can happen, and has happened in this case, because in the past the company has enjoyed non-distribution relief in respect of profits not then distributed to its members; and then when those profits come to be distributed, as happened here in the liquidation, the company has to pay distribution charges, corresponding to the earlier non-distribution relief, in addition to profits tax payable in respect of the actual profits for the period in question. The drafting of the various statutory provisions suggests that this possibility was overlooked, but that is hardly surprising. We are therefore confronted with the not unusual problem of applying statutory provisions to circumstances which they were not designed to meet. In such a case it appears to me to be necessary to make a rather wide survey, because one can easily reach a wrong conclusion if attention is concentrated only on those provisions which are immediately applicable to the particular case.

Two general points call for notice. In the first place, in cases where the Special Commissioners direct that the whole actual income of a company is to be deemed to be the income of its members, such income would be subject to triple taxation unless special provision were made—it would be subject to income tax, profits tax and surtax, notwithstanding the fact that surtax is a tax on individuals and that individuals are not subject to profits tax. And, secondly, the matter is complicated by the fact that the provisions regarding profits tax and surtax might seem to be at cross-purposes. Non-distribution relief in respect of profits tax is calculated to discourage companies from making a full distribution of profits to their members; whereas the provisions with regard to directions by the Special Commissioners are calculated to encourage such distribution by imposing heavy, and indeed penal, liabilities on companies which fail to make sufficiently large distributions.

It seems appropriate first to consider sections 245 and 262 of the Income Tax Act, 1952 (which replaced section 21 of the Finance Act, 1922, and section 14 (1) of the Finance Act, 1939). The relevant parts of those sections are as follows:

"Section 245.—*Power to direct that income of bodies corporate is to be deemed to be income of their members.*

"With a view to preventing the avoidance of the payment of surtax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted that where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period for which accounts have been made up, distributed to its members, in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of surtax, a reasonable part of its actual income from all sources for the said year or other period, the Commissioners may, by notice in writing to the company, direct that, for purposes of assessment to surtax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members."

"Section 262.—*Investment companies; directions to be given automatically for all years in certain cases.*

"(1) Subject to the provisions of this section with respect to companies with estate or trading income, the whole of the actual income from all sources, for every year of assessment, of every investment company to which section two hundred and forty-five of this Act applies shall, however much or however little thereof has been distributed to its members, be deemed for the purposes of assessment to surtax to be the income of the members of the company, and accordingly the Special Commissioners shall give a direction under the said section two hundred and forty-five in respect of each year of assessment in relation to every such company without considering whether or not the company has distributed a reasonable part of its said income. (2) The provisions of this Chapter shall apply, with the necessary modifications, in cases in which directions are "given by virtue of subsection (1) of this section as they apply "in cases in which directions are given by virtue of the last "preceding section with respect to a year of assessment: Provided that—(*a*) no deduction shall be allowed in computing the "actual income from all sources of the company which would "not be allowable in computing the total income of an individual "for the purposes of this Act, other than deductions for any "profits tax payable by the company or for any such sums "disbursed by the company as expenses of management as the "Special Commissioners consider reasonable, having regard to "the requirements of the company's business and, in the case of "directors' fees or other payments for services, to the actual "services rendered to the company; . . ."

"Actual income" is defined as follows, by section 255 (3): "In computing, for the purposes of this Chapter, the actual "income from all sources of a company for any year or period, "the income from any source shall be estimated in accordance "with the provisions of this Act relating to the computation of "income from that source, except that the income shall be computed by reference to the income for such year or period as "aforesaid and not by reference to any other year or period."

The procedure for apportionment of income is set out in section 248 as follows: "(1) Where a direction has been given "under section two hundred and forty-five of this Act with "respect to a company, the apportionment of the actual income "from all sources of the company shall be made by the Special "Commissioners in accordance with the respective interests of "the members. (2) Notice of any such apportionment shall be "given by serving on the company a statement showing the "amount of the actual income from all sources adopted by the "Special Commissioners for the purposes of the said section 245 "and either the amount apportioned to each member or the "amount apportioned to each class of shares, as the Commissioners think fit."

It will be seen that section 245 is the leading section. Under it the giving of a direction is within the discretion of the Special Commissioners and before giving a direction they must determine whether or not a reasonable part of the company's actual income has been distributed. It would seem to be clear that they cannot determine whether a reasonable part of the actual income has been distributed unless they know what the actual income was. There appears to be no means whereby a direction once given can later be cancelled or withdrawn and therefore it would not be right for the commissioners to make their determination until they had before them all the facts from which the actual income could be computed and had made the necessary computation. When this section was enacted profits tax was still a permissible deduction for income tax purposes, and it would require an exceedingly cogent argument to persuade me that the commissioners were not required to deduct profits tax in computing the actual income which they must have in mind when determining whether a reasonable part of it has been distributed.

Section 262 applies to a particular class of the companies to which section 245 applies. When it applies the commissioners have no discretion. They are required to give a direction, which is a direction under section 245, whether or not a reasonable part of the actual income has been distributed. Again it would require an exceedingly cogent argument to persuade me that "actual income" in this section has a different meaning from "actual income" in section 245.

In the present case the taxpayer, the company, seeks to compel the commissioners to issue a direction under this section. It must be very unusual for a taxpayer to take this course, but I think that it is open to the company provided it can show that the section does apply. But in my judgment the section cannot apply unless there is some "actual income" for the period in question. Subject to an exception which does not arise in this case, the section provides that the whole actual income for every year of assessment shall be deemed to be the income of the members of the company, and the giving of a direction is merely for the purpose of achieving this object. It would be quite unreasonable to read this section as requiring the commissioners to give a direction as regards a year when the company had no actual income and there was nothing which could be deemed to be the income of its members. Moreover, a direction must be followed by an apportionment. Directions given by virtue of section 262 are directions under section 245, and section 248 requires that every such direction must be followed by a statement showing the amount of the actual income adopted by the commissioners for the purposes of section 245 and the amount apportioned to each member or each class of shares. It would be even more unreasonable to read this as requiring the commissioners to apportion a non-existent income by attributing nil to each member or class of shares.

I have said that this company was an investment company. A point was taken that, by reason of the definition, a company can only be an investment company so long as it has an actual income, and that if this company had no actual income during the period in question it ceased to be an investment company during that period. I find it unnecessary to deal with the point and only mention it to avoid any misunderstanding.

The question, therefore, is whether for the period in question the company had any actual income. If the profits tax of £16,421 was not a proper deduction, then the company had an actual income, and the commissioners were bound to give a direction and to apportion that income. But if the profits tax was deductible in ascertaining the actual income, then the company had no actual income, the commissioners were not bound to give a direction, and this appeal must succeed.

It is, I think, clear that any profits tax which was "payable" by the company at the time when the computation of actual income was made must be deducted in making that computation. That is, in effect, enacted by the proviso to section 262 (2) which I have already quoted. The Finance Act, 1952, by section 33, provided that in general profits tax should not be a deduction, but special provision was made by section 68 to cover cases involving directions. The relevant parts of that section are: "(1) Where for the purposes of section twenty-one of the Finance "Act, 1922, or Chapter III of Part IX of the Income Tax Act, "1952 (which provide for the payment of surtax, in certain cases, "on undistributed income of companies), the actual income from "all sources of a body corporate for a year or period ending after "the end of the year nineteen hundred and fifty-one falls to be "computed under paragraph 6 of the First Schedule to the said "Act of 1922 or subsection (3) of section two hundred and fifty-"five of the said Act of 1952, then, if any amount is payable by "the body corporate by way of the profits tax or the excess "profits levy, respectively, for any chargeable accounting period "falling wholly or partly within that year or period, a deduction "shall be allowed, in computing the said actual income, of such "an amount as would, after deduction of income tax at the "standard rate in force for the year of assessment during which "the said year or period ends, be equal to so much of the "amount so payable by the body corporate as is apportionable "to the said year or period: . . . (2) Paragraph (*a*) of the proviso "to subsection (2) of section two hundred and sixty-two of the "Income Tax Act, 1952 (which relates to the deductions allow-"able in computing the actual income from all sources of an "investment company in relation to which a direction is in force "under subsection (1) of that section), shall have effect as if "instead of authorizing a deduction for profits tax payable by the "company it authorized a deduction, in relation to any amount "payable by the company by way of profits tax or the excess "profits levy, of such an amount as would, after deduction of "income tax at the standard rate in force for the year of assessment in respect of which the direction is given, be equal to the "first-mentioned amount. . . . (4) If—(*a*) the amount payable "by a body corporate in respect of the excess profits levy for "any chargeable accounting period is reduced by reason of a "deficiency of profits for a subsequent period; and (*b*) the amount "deducted under the preceding provisions of this section in "computing the actual income from all sources of the body "corporate was arrived at without regard to the reduction and "is excessive in view thereof, such apportionments, assessments "or additional assessments to surtax shall be made as are necessary to counteract the excessive deduction and may be so "made notwithstanding that the time limited by law for making "assessments or additional assessments has expired."

Again, a deduction is to be made if any amount is "payable" by way of profits tax. The amount of the deduction is not the sum payable as profits tax but that sum "grossed up." But no point arises on that in this case.

I hope that I state the company's contention accurately when I say that it is that the profits tax which has been assessed on the company was not and is not now "payable" within the meaning of these provisions, because if a certain event should happen the company would be under no obligation to pay the tax. To understand this contention it is necessary first to consider the provisions of section 31 of the Finance Act, 1947. Subsection (1) provides (subject to modifications which do not affect the present question) that section 19 of the Finance Act, 1937 (the section which charges profits tax) shall not apply to any trade or business unless it is carried on by a body corporate, unincorporated society or other body. Having so provided, it then was logical and reasonable to make special provisions for the case where a business is carried on by a body corporate, but, by reason of a direction by the Special Commissioners, the actual income of the body corporate must be deemed to be the income of its members so as to attract surtax. Profits tax was now only a tax on bodies corporate; surtax was and is only a tax on individuals. So it would not have been appropriate to charge both profits tax and surtax in respect of the same income. The remaining provisions of section 31 appear to be intended to avoid this double taxation, so far as possible. Those provisions, so far as relevant to this matter, are as follows: " (2) The said section " nineteen shall not apply to any trade or business carried on by " a body corporate during any chargeable accounting period if, " for a year or period which includes, or for years or periods " which together include, the whole of the chargeable accounting " period, the actual income of the body corporate from all sources " is apportioned under or for the purposes of section twenty-one " of the Finance Act, 1922, and all the persons to whom it is " apportioned are individuals. (3) If, for a year or period which " includes, or for years or periods which together include, the " whole of a chargeable accounting period of a trade or business " carried on by a body corporate, the actual income of the body " corporate from all sources is apportioned under or for the " purposes of the said section twenty-one, and some (but not " all) of the persons to whom the income is apportioned are " individuals, then if by notice in writing given to the Commis" sioners within six months from the end of that chargeable " accounting period, or such longer time as the Commissioners " may in any case allow, the body corporate and the persons " other than individuals to whom the income is apportioned " jointly so elect as respects that chargeable accounting period " and each subsequent chargeable accounting period the whole " of which is included in a year or period or years or periods for " which the said actual income is so apportioned to those persons " and persons who are individuals, the provisions of this Part of " this Act shall apply as if—(*a*) the trade or business had been " carried on, during that and each such subsequent chargeable " accounting period, in partnership by the persons to whom the " income is apportioned, and the share of any one of them of " the profits and losses of the trade or business therefor had been " equal to the proportion of the income apportioned for the year " or period or years or periods in question which is apportioned " therefor to that one of them; . . . and the body itself shall " not be chargeable to profits tax for that or any such subsequent " chargeable accounting period."

Subsection (2) deals with the case where all the members of the company are individuals, and, before coming to the more complicated provisions of subsection (3), I think it desirable to deal with subsection (2). Its provisions are somewhat complicated because the periods in respect of which profits tax and surtax are calculated are not the same. But I do not think that any light

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is thrown on the present question by considering this complication. Omitting it, the subsection provides that the section charging profits tax " shall not apply . . . if . . . the actual " income of the body corporate . . . is apportioned under or for " the purposes of section 21 of the Finance Act, 1922 " (now section 245 of the Income Tax Act, 1952). That appears to me to mean that the section charging profits tax does apply unless and until the actual income has been apportioned, but that it ceases to apply if and when the apportionment is made. That can be illustrated in this way: The Special Commissioners who deal with directions do not deal with profits tax, and in the general case of a trading company a considerable time may elapse before they are in a position to decide whether to give a direction. In the meantime profits tax may well have been assessed and on a demand being made for payment of the assessed profits tax it would, in my opinion, be no answer for the company to say that the profits tax is not payable because the Special Commissioners may later give a direction, which would be followed by an apportionment and consequent relief from the tax. The profits tax must be paid, but, if later a direction is given by the Special Commissioners and is followed by an apportionment, then the section charging profits tax does not apply and the tax which has been paid must be repaid. Any other view would mean that the recovery of profits tax from " section 21 " trading companies would be held up for years until it was clear that the Special Commissioners could not give directions to them under section 245.

If I am right so far, then it appears to me necessarily to follow that, at least as regards trading companies where the commissioners have a discretion whether or not to give a direction, profits tax which has been assessed is " payable " in every ordinary sense of that word and therefore must be allowed as a deduction by the commissioners in computing the actual income which they adopt when considering whether the sums which have been distributed to the members amount to a reasonable part of the company's actual income. Otherwise there might be grave injustice. The commissioners' decision whether a reasonable part of the actual income has been distributed must depend in large measure on the figure which they adopt as the amount of the actual income. If this figure is inflated by neglecting the liability for profits tax because it is not yet " payable," the commissioners might see fit to give a direction which they would not have given if the amount of actual income which they had in mind had been the lower figure resulting from deduction of the amount of profits tax. It appears to me to be an inadequate answer to say that, although the commissioners are not entitled to deduct profits tax in computing actual income because it is not yet "payable," yet they make allowance for profits tax as a potential liability in considering whether the amount of the actual income which has been distributed is reasonable.

The terms of section 68 of the Finance Act, 1952, appear to me to give strong support to the view which I have expressed. But the Court of Appeal took a different view of this section and it is therefore necessary to examine it with some care. It directs that where for the purposes of Chapter III of Part IX of the Income Tax Act, 1952, the actual income of a company "falls "to be computed" under section 255 (3), then, if any profits tax or excess profits levy is payable, a deduction shall be allowed. The Court of Appeal held that the actual income did not fall to be computed until after a direction had been given. With all respect, I am unable to agree. Chapter III includes all the provisions with regard to the giving of directions to which I have referred. Section 255 (3) is merely the definition of "actual income." I have already given my reasons for thinking that the provisions of Chapter III require the commissioners to determine the amount of actual income before they decide whether or not to give a direction in cases where they have a discretion, and therefore it appears to me that the actual income does "fall to be computed" within the meaning of section 68 at that stage. And the same must apply to investment companies because, for the reasons I have stated, directions can only be given to those companies if they have an actual income, and before giving a direction there must be a computation to determine whether there is any actual income. Moreover, under section 248 the commissioners must apportion the amount of the actual income adopted by them for the purposes of section 245. There is no provision for a computation of actual income after the direction but before the apportionment and that again appears to me to require a computation before a direction is given.

The Court of Appeal also relied on the terms of section 68 (2). That subsection deals with the amount of a deduction. The difficulty does not arise from the enacting words but from the words in brackets which purport to describe the proviso to section 262 (2) of the Income Tax Act, 1952. Those words could well be held to support the view of the Court of Appeal, but they seem to me to be a misdescription of the proviso to section 262 (2). This is one of the places where I think that obscurity has resulted

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from a failure of the draftsman to anticipate a case like the present—as I have said, a very natural failure. In fact the proviso merely deals with the deductions to be allowed in computing actual income. But the words in brackets in section 68 (2) refer to deductions in computing the actual income of a company "in relation to which a direction is in force" under section 262 (1). It would seem that these words have crept in because the draftsman assumed that a direction would always be given automatically to an investment company and did not realize that a computation must first be made to determine whether the company has in fact any actual income. Whether that be the true explanation or not, I cannot regard the presence of these words in brackets, which are mere description, as of much weight in comparison with the other considerations to which I have referred.

It therefore appears to me that section 68 has enacted that when a computation of actual income is being made by the commissioners before they consider whether or not to give a direction, then, if any amount is payable as profits tax, a deduction shall be allowed. But the argument for the company is that at that stage no profits tax can ever be "payable" because the tax cannot be finally payable until the commissioners have decided that no direction is to be given. If the company's argument is right I cannot imagine any possible case where profits tax could be "payable," in the sense of finally payable, at that stage, and no such case was suggested in argument: so this provision of section 68 would be meaningless.

A further argument was submitted for the company. If the amount of profits tax is deducted in computing the income apportioned and thereafter by reason of the apportionment profits tax ceases to be payable, then the sum so deducted will be retained by the company unapportioned and will not be chargeable to surtax. If this were so, it would support the company's contention, but the Attorney-General submitted an argument that this sum would not escape taxation but could be covered by an additional apportionment.

Section 68 also deals with excess profits levy. Some argument was based on the provisions which deal with this tax. For what they are worth in this connexion they appear to me to support the appellants' contention because they make it clear that excess profits levy is "payable" within the meaning of this section although not finally payable because events in subsequent years may cause the amount "payable" to be ultimately reduced.

I can now turn to section 31 (3) of the Finance Act, 1947, under which the present question arises. This subsection applies where, as in the present case, not all the members of the company subject to direction are individuals, some being corporate bodies. Giving a direction imposes a liability on the company to pay surtax, but it does not directly affect individual members unless they choose to relieve the company by paying their shares of the surtax. It does, however, affect the tax position of non-individual members and it was apparently thought that such members required special protection. Accordingly, a direction given to a company with non-individual members is not followed automatically by relief from profits tax, as it would be if all the members were individuals. Such relief only arises if the company itself and its non-individual members jointly elect to claim it. One might suppose that it would always be in their interest to claim the relief, but we were informed that there are cases where that is not so, in view of the fact that the election to claim relief, once made, applies not only to the period in question but to all subsequent periods.

Basically, the schemes under subsections (2) and (3) of section 31 are the same. Under whichever subsection the case falls, no question of relief from profits tax can arise until there has been a direction and consequent apportionment of the actual income of the company. There cannot be a direction unless the company has an actual income, and in determining whether the company has an actual income there must be deducted profits tax which is payable and will remain payable if no direction is given. The only difference is that, whereas under subsection (2) relief from profits tax is automatic once a direction is given, under subsection (3) there is a further stage and there must be an election before relief is granted. If all the members of this company had been individuals there would have been no automatic relief from profits tax, for the reasons which I have given; and for the same reasons there is no right to elect that there shall be relief. It would be somewhat strange if it were otherwise. If the company were right they would escape payment of £16,421 by electing to pay surtax on a sum not exceeding £8,920. Such a result might follow from the construction of numerous and complicated enactments but it could hardly have been intended.

It only remains to note a further argument for the company. In this case the profits tax was assessed but the assessment is still under appeal, and it was said that, whatever might be the effect when such an assessment had become final, the tax cannot be "payable" before that. I do not intend to express any opinion about a case where there has been no assessment or where the amount payable is in dispute. But it appears that the only ground for the appeal in the present case is that nothing is "payable"—the same ground as the company maintains before your Lordships. If this appeal is allowed it follows that the appeal against the assessment must fail and therefore I think that it is proper to disregard the fact that that appeal is still pending.

In my judgment this appeal should be allowed. I agree with what my noble and learned friend has just said about costs.

LORD SOMERVELL OF HARROW. My Lords, where the actual income of companies liable to surtax falls to be computed, section 68 of the Finance Act, 1952, allows a deduction if any amount is payable by the company by way of the profits tax or the excess profits levy. Section 31 of the Finance Act, 1947, gives exemption from profits tax to such companies if certain conditions are fulfilled. Under section 31 (2), if the actual income from all sources is apportioned and all the persons to whom it is apportioned are individuals, the section which charges the profits tax is not to apply. Under section 31 (3), if the actual income from all sources is apportioned and some but not all of the persons to whom it is apportioned are individuals, then the company is not chargeable to profits tax if, by notice, the company and the persons aforesaid, other than individuals, so elect. The election binds those concerned for the current and all subsequent chargeable accounting periods. There are other provisions which I need not summarize.

The question turns on the construction of section 68 and in particular on the word "payable." The taxpayer submits that no deduction is to be made unless and until it is clear that the conditions of section 31 providing for exemption cannot be fulfilled. In other words, "payable" means payable in the last resort. As apportionment is a condition precedent to the exemption under section 31, there can, on this view, be no deduction before or for the purpose of apportionment. There is an initial difficulty, to my mind, in that there must be computation before apportionment and, on the face of it, the deduction is to be made when the actual income falls to be computed.

The Crown submits that the profits tax is payable within the section notwithstanding that later events may give exemption. The courts below have accepted the taxpayer's contention. It is, no doubt, a possible meaning of "payable," a meaning which certain contexts might make plainly right.

It is therefore necessary to consider the context. Beginning with trading companies under section 245 of the Income Tax Act, 1952, the first computation of the actual income from all sources would be in order that the commissioners may decide whether the company has or has not distributed a reasonable amount of its income. In considering that question, it would be absurd to disregard the liability to profits tax. If the commissioners decide that there has been no failure to distribute a reasonable amount, no exemption under section 31 will arise. The taxpayer's submission does not make sense at that stage. This stage does not exist in the case of investment companies where the direction is automatic (section 262 of the Income Tax Act, 1952). If the commissioners decide to make a direction and apportionment, and all the members are individuals, the taxpayer's construction works more simply than the Crown's. If the actual income is £2,000 and the profits tax £500, the Crown has to make two bites at the cherry, although under section 31 (2) there can be no ultimate liability to profits tax. When one comes to section 31 (3) the Crown would on the above figures apportion £1,500, and then have to have an additional apportionment of £500 if, but only if, the election were exercised. On the taxpayer's construction the whole £2,000 would be apportioned, since the election might destroy liability to profits tax. The Attorney-General submitted that there would be no machinery if the election were not exercised for withdrawing the original apportionment and substituting one for £1,500. In his view, surtax would be levied on the whole £2,000 and the taxpayer would in addition have to pay £500 profits tax. If I had thought the taxpayer's construction was right, there would, in my opinion, be no difficulty in implying a power to make the necessary adjustment to carry out the substantive effect of the Act.

If one considers consequences, the results of the taxpayer's construction would be remarkable. In the present case, however small the actual income and however large the distribution charges, the apportionment of the former would relieve the taxpayer of all liability for the latter if all members were individuals or if the election were exercised. Benevolent as at times financial provisions may be, it is impossible to believe that such capricious benevolence could have been intended. Unhappily the Crown's submission has its own anomaly, though perhaps a lesser one. On the Crown's contention, if the profits tax is less than the actual income by however small a sum, the whole of the actual income is treated on a surtax basis and no profits tax is exigible. I am assuming that either it is a section 31 (2) case or the election is exercised. If, on the other hand, the profits tax exceeds the actual income by however small a sum one would have expected the actual income to be treated on a surtax basis, the excess of the profits tax over that amount being payable as profits tax. This is not the result on the Crown's contention. The whole has to be handed over as profits tax, the taxpayer not retaining what would be left out of the actual income after surtax.

Context and consequences do not, in my opinion, give any sufficient support to the taxpayer's construction. The ordinary meaning of "payable" is, I think, that for which the Crown contend, that is, payable at the time of computation disregarding the fact that subsequent events may destroy the liability.

I would, therefore, allow the appeal.

LORD DENNING. My Lords, this case depends on the meaning of the word "payable" in section 68 of the Finance Act, 1952. The courts below have held that profits tax is not "payable" within that section until it has been ascertained that no election can or will be made under section 31 (3) of the Finance Act, 1947.

It seems to me that this treats the making of an election as a *condition precedent* to the profits tax being payable; whereas, on the true construction of the statute, it is not a condition precedent but a *condition defeasant*. The profits tax is "payable" when everything has happened to make it payable, that is to say, when it is duly assessed on the taxpayer. It may thereafter cease to be payable if an election is made: but, that being a condition defeasant, the legal position is that right up till that moment it is payable. The result is that in computing the "actual income" of these surtax companies—so as to see whether a direction or apportionment should be made—the profits tax (grossed up) must be deducted before the direction or apportionment is made. This is a sensible and practical way of working the Act.

I would allow the appeal.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Smith & Hudson for Rollitt, Farrell & Bladon, Hull.*

F. C.

[HOUSE OF LORDS.]

INLAND REVENUE COMMISSIONERS . APPELLANTS;

AND

SOUTH GEORGIA CO. LTD. . . . . RESPONDENT.

H. L. (Sc.)*

1958

Jan. 20, 21;
Feb. 27.

Revenue — Profits tax — Distribution charge — Chargeable accounting period—Trading company—Trading loss exceeding franked investment income — Distributions smaller than franked investment income — "Profits computed without abatement and including "franked investment income" — Meaning of "including" — Whether investment income to be added to nil trading profits—Finance Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *ss.* 30, 32 (1), 34 (2).

The net relevant distributions for any chargeable accounting period, by reference to which the distribution charge for the purposes of profits tax is ascertained, are defined by section 34 (2) of the Finance Act, 1947, as ". . . so much of the gross relevant "distributions . . . for that period . . . as bears to the whole of "the . . . gross relevant distributions the same proportion that "the profits for that period bear to the profits therefor computed "without abatement and including franked investment income: "Provided that where the said gross relevant distributions exceed "the profits computed without abatement and including franked "investment income, the net relevant distributions shall be the "sum of—(*a*) the profits for the period computed with due regard "to the provisions for abatement but not including franked investment income; and (*b*) the amount of the excess."

During the chargeable accounting period ended October 31, 1953, a company incurred a trading loss of £602,000 and received franked investment income to the extent of £272,000. No question of abatement arose. It paid £181,000 in dividends, the gross relevant distributions. A profits tax distribution charge was made on the company in respect of this sum on the footing that it represented net relevant distributions under section 30 (3) and (4) of the Act and that the proviso to section 34 (2) applied. It was common ground that if the proviso was inapplicable, no charge could be imposed:—

Held, that for the proviso to apply, the gross relevant distributions (£181,000) must exceed not the sum computed in two operations by first ascertaining the trading profit (nil) and then adding the franked investment income (viz., £272,000), but the sum obtained by computing the trading profit and franked investment income together to arrive at the total profits (nil). Accordingly, as "the profits . . . including franked investment income" were nil, the gross relevant distributions exceeded them by £181,000 and nothing had to be brought in under (*a*), because there were no profits, so that there was left "the amount of the excess" under (*b*). It was not a condition precedent to the application of the proviso that there should be a profit when the franked investment income was included in the computation. Unless the contrary was shown, it could only be assumed that the dividends had been paid out of undistributed profits of earlier periods, which was itself the reason for the distribution charge being made. The company was accordingly correctly charged to profits tax by way of a distribution charge for the chargeable accounting period in respect of the £181,000.

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD TUCKER, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

Decision of the First Division of the Court of Session, 1957 S.L.T. 115; 35 A.T.C. 480 reversed.

Appeal from the First Division of the Court of Session.

In this appeal from the unanimous decision of the First Division of the Court of Session as the Court of Exchequer in Scotland (Lord President Clyde, Lord Carmont, Lord Russell and Lord Sorn) the appellants, the Commissioners of Inland Revenue, sought to have reversed an interlocutor pronounced affirming the determination of the Commissioners for the Special Purposes of the Income Tax Acts on an appeal by the respondent company, South Georgia Co. Ltd., against an assessment to profits tax for the chargeable accounting period, November 1, 1952, to October 31, 1953, in the sum of £36,363 12s. The Special Commissioners decided that the assessment had been wrongly imposed on the respondent company on an erroneous construction of section 34 (2) of the Finance Act, 1947, and they discharged the assessment. At the request of the appellants the Special Commissioners stated a case for the opinion of the Court of Session, posing the question whether their construction of section 34 (2) was correct. The case was heard on November 29, 1956, and on December 7, 1956, their Lordships delivered judgment and pronounced the interlocutor appealed against, whereby they answered the question in the affirmative, affirmed the determination of the Special Commissioners and refused the appeal. The respondent company submitted that the interlocutor was well founded in law and should be affirmed.

The respondents for many years carried on the business of whalers. Their accounts for the chargeable accounting period of one year to October 31, 1953, as computed for profits tax and excluding franked investment income, showed a loss of £602,000. The franked investment income for the same period amounted to £272,000 and the gross relevant distributions for the same period amounted to £181,818. The assessment was on the footing that this sum represented a net relevant distribution under section 30 (3) and (4) of the Finance Act, 1947.

William Grant Q.C., S.-G. for Scotland, W. R. Grieve Q.C. (of the Scottish Bar) and *Alan Orr* (of the English Bar) for the appellants. The company was correctly charged to profits tax by way of distribution charge for the period in question in respect of the round sum of £181,000, on which tax at the rate of 20 per cent. amounted to £36,363 12s. The gross relevant distributions were £181,000. The profits, including franked investment income, were nil. Therefore the net relevant distributions must be the excess of the former over the latter, that is, £181,000. Nothing has to be brought in under section 34 (2) (*a*) of the Finance Act, 1947, for there were no profits.

The following submissions are made: (1) The phrase "profits ". . . including franked investment income" involves a single computation of profits on a sound commercial basis. In making that computation one must take into account the whole of the company's income, trading income, investment income and franked investment income.

(2) There must be a single computation on similar lines in order to find out "the profits . . . not including franked investment income." In each case the answer is nil.

(3) Here the profits including franked investment income are nil and distribution has been made. The proviso to section 34 (2) of the Act must apply because the "gross relevant distributions "exceed the profits."

(4) If that be so, the net relevant distribution is the sum of (*a*) the profits not including franked investment income (nil), and (*b*) the excess of the gross relevant distributions over the profits including franked investment income (£181,000).

What is to be ascertained is a distribution which is not covered by current profits. Section 34 provides the only way of finding out the net relevant distributions even where there is no franked investment income. For example, if there was a trading profit of £1 and no franked investment income and there was a distribution of £100, the proviso would apply because there would be a profit and the gross relevant distribution would exceed it by £99. On the argument for the respondent company, if there were a loss of £1, the proviso would not apply because the profit would be nil. It makes no difference whether the loss is £1 or £100,000. If the proviso applies where there is a profit of £1, it must equally apply where the profits are nil or where there is a loss because there are no current profits. To hold otherwise would lead to a remarkable situation. In each calculation if there is a loss the profits are nil and if there is a distribution it must exceed the profits, since if there is a loss there are no profits.

C. J. D. Shaw Q.C., Dean of the Faculty, and *Alastair Johnston* (of the Scottish Bar) for the respondent company. The point, which is in a small compass, depends on section 34 (2) of the Act. The main part of it does not apply, so the question is what is the effect of the proviso. Paragraph 7 (1) of Schedule IV to the Finance Act, 1937, as amended by section 32 (1) of the Act of 1947, is important. Its effect is to exclude income which has already borne profits tax from the actual profits of the receiving company subject to profits tax under paragraph 1. It affords a statutory description of the word "profits" for the purposes of the Act and defines "profits . . . including franked investment "income."

If the calculation of the profits including franked investment income would result in a loss, the profits cannot be said to include it, though, on the Crown's submission, it must be included in a loss. But a profit in some sense must be found before franked investment income can be included in it. So, if there is a trading loss, the proviso cannot apply. It is "profit" and not "profit "and loss" which is to be ascertained. What Lord Sorn said on this point in the court below [1] is relied on. There is a dialectical difficulty in including the franked investment income in a loss or in nothing. The statutes did not contemplate that the profit could only be ascertained after the franked investment income had been taken into account. See what the Lord President said in the court below.[2] It is doubtful whether the framers of the Act had in mind the fact that there might be a loss.

The proviso to section 34 (2) of the Act of 1947 cannot apply unless there is a profit after including franked investment income and also the gross relevant distributions exceed that profit. Since there was no such profit here, but a loss of £330,000 (i.e., £602,000 – £272,000), the proviso cannot apply. One cannot talk of a nil profit or of adding something to it. The "profits" in this legislation must be profits apart from franked investment income. One must first compute the profits apart from the franked investment income and then add the latter. But here there are no profits and the franked investment income is

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[1] 1957 S.L.T. 115, 120; 35 A.T.C. 480, 486.

[2] 1957 S.L.T. 115, 118; 35 A.T.C. 480, 484.

£272,000 and the sum of the two is more than the gross relevant distributions (£182,000).

Alternatively, as set out in the respondents' case: "Even "if the appellants were entitled to take the profits including "franked investment income at a minus figure of £330,000 in "order to make the calculations set forth in the proviso, the "result of the sum was that the excess of the gross relevant "distribution (£181,000) over the profits including franked investment income (minus £602,000 plus £272,000 = minus £330,000) "was £511,000, which, when added to the profits for the period, "gave a figure of minus £91,000 for the net relevant distributions."

William Grant Q.C., S.-G. for Scotland, in reply. The dialectical difficulty referred to in the argument for the respondents would have equal force where there was unfranked investment income and a trading loss. [Reference was made to *Lamson Paragon Supply Co. Ltd.* v. *Inland Revenue Commissioners*.[3]]

Their Lordships took time for consideration.

February 27. VISCOUNT SIMONDS. My Lords, in my opinion the interlocutor against which the Commissioners of Inland Revenue have brought this appeal cannot be sustained. The relevant facts are few and not in dispute nor is the point at issue susceptible of long discussion.

The respondent company have for many years carried on business as whalers. Their accounts for the chargeable accounting period of one year to October 31, 1953, as computed for profits tax and excluding "franked investment income" (an expression which I will presently explain), showed a loss of £602,000. The franked investment income for the same period amounted to £272,000 and the gross relevant distributions, an expression which for the purpose of this case may be regarded as equivalent to dividends, for the same period amounted to £181,818, which has been in the case stated at the round figure of £181,000. They were assessed to profits tax upon the footing that this sum represented a net relevant distribution under the provisions of section 30 (3) and (4) of the Finance Act, 1947. The question is whether they were rightly so assessed, and the answer to that question turns on the correct interpretation of the statutory provisions relating to profits tax and particularly of the proviso to section 34 of the Act of 1947. The Commissioners for the

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[3] [1951] 2 T.L.R. 723.

Special Purposes of the Income Tax Acts determined that the assessment was wrongly made and in that determination were upheld by the First Division of the Court of Session.

It is necessary to refer briefly to the legislative background to the sections which particularly require your Lordships' consideration.

Profits tax was first imposed by the Finance Act, 1937, under the name of national defence contribution; its name was changed in 1946. It was levied at a flat rate percentage on profits arising in each chargeable accounting period from any trade or business to which the section applied. Such profits were to be computed on income tax principles as adapted in accordance with the provisions of Schedule IV to that Act. I do not pause now to refer to these provisions and their subsequent amendment. Their importance in this case deserves detailed examination at a later stage.

The Finance Act, 1947, made considerable changes. In the first place the tax was no longer to be imposed on a class of persons hitherto subject to it. With that change we are not concerned. In the second place the tax was no longer imposed at a flat rate on all profits but a differential was established in order to discourage distribution and encourage retention by granting relief in respect of profits not distributed but retained. In the third place it provided that a tax, called a distribution charge, should be imposed on profits which, having been retained and having therefore enjoyed non-distribution relief, were distributed in a later accounting period. The effect of this legislation as subsequently amended at the relevant date was that the tax in respect of distributed profits was 22½ per cent., and of undistributed profits was 2½ per cent. (a differential of 20 per cent.) and the distribution charge was 20 per cent.

I now turn to the sections which demand closer examination, and, first, to the statutory provision for the computation of profits. I have pointed out that they are to be computed on income tax principles as adapted in accordance with the provisions of Schedule IV to the 1937 Act as subsequently amended. I think it necessary only to refer to paragraph 7 of the Schedule as amended by section 32 of the Act of 1947. The relevant parts of it as thus amended are as follows: "(1) Income received from "investments or other property shall be included in the profits "except—(*a*) income received directly by way of dividend or "distribution of profits from a body corporate carrying on a trade "or business to which section 19 of this Act applies; and "(b) income so received from any other body corporate, being "income received indirectly by way of dividend or distribution "of profits from a body corporate carrying on such a trade or "business as aforesaid; . . . (1A) Any reference in any enactment relating to the profits tax to franked investment income "shall be construed as a reference to the income which would be "included in the profits if paragraphs (a) and (b) of the preceding sub-paragraph had been omitted, and, in computing "profits for the purposes of so much of any such enactment as "refers to profits including franked investment income, the said "sub-paragraph shall have effect as if the said paragraphs (a) "and (b) were omitted."

My Lords, the meaning of this provision appears to have caused some difficulty, but I think that it is reasonably clear and means (so far as is relevant to our present purpose) no more than this, that when you find the expression "profits . . . including "franked investment income" you disregard for the purpose of your computation paragraphs (a) and (b) and include in it the income derived from all the investments and property of the company regardless of the fact that in a computation made in another connexion and for another purpose you may have to exclude the income from some, but not all, of its investments. A single ordinary commercial computation of profits has to be made, of which the result may be to show some profit, no profit or a loss. I come then to section 34 of the Act and its all-important proviso.

That section provided by subsection (1) that it and the three next succeeding sections should, subject as therein mentioned, determine what was to be taken, for the purposes of the provisions of the Act relating to reliefs for non-distribution and distribution charges, as the net relevant distributions for any chargeable accounting period, and by subsection (2) it provided as follows: "The net relevant distributions . . . for any chargeable "accounting period . . . are so much of the gross relevant "distributions . . . for that period . . . as bears to the whole of "the said gross relevant distributions the same proportion that "the profits for that period bear to the profits therefor computed "without abatement and including franked investment income: "Provided that where the said gross relevant distributions exceed "the profits computed without abatement and including franked "investment income, the net relevant distributions shall be the "sum of—(a) the profits for the period computed with due regard "to the provisions for abatement but not including franked "investment income; and (b) the amount of the excess."

Upon this proviso, interpreted in the light of paragraph 7 of the Schedule as amended, the appellants make a very simple case. Upon the undisputed figures the gross relevant distributions were £181,000, the profits including franked investment income were nil (I may interpolate that the reference to abatement may throughout be disregarded), therefore the net relevant distribution must be the excess of £181,000 over nil, i.e., £181,000; nothing has to be brought in under (*a*) of the proviso, for there were no profits.

To the claim thus formulated the respondents make as simple a reply. They say that the proviso has no application to the present case because it only applies where (1) there is a profit after including franked investment income, and (2) the gross relevant distributions exceed such profit, and here there was no such profit. Therefore, they say, the proviso did not come into operation, and the assessment was wrongly made. I may observe here that it is common ground that, if the proviso is inapplicable, no charge can be imposed, for a calculation made in accordance with the formula contained in the body of subsection (2) would show no net relevant distribution.

Everything, therefore, turns on the meaning of the proviso and whether it is in effect a condition precedent to its application that there should be a profit when the franked investment income is included in the computation. As the learned Lord President said,[1] "the proviso can only apply if there is a profit once "the franked investment income is included," and Lord Sorn expressed a similar opinion.

My Lords, I have already indicated my view upon what a computation of profits in the terms of the proviso involves. I will repeat that it involves, not two operations, first the ascertainment of trading profit or loss and then the addition of franked investment income, but a single operation which takes into one account the trading profit or loss and the investment income, whether franked or not. I cannot, with all respect to the Lord President, accept the view that to interpret "including" as meaning "adding" fits more convincingly into the scheme of section 32 of the Act than does the appellants' contention. On the contrary, I think that the latter contention accords with the primary purpose of section 34 of the Act (the relevant section in this connexion), which I understand to be to determine how much of an actual dividend paid for a particular period is to be regarded as having been paid out of (a) the chargeable profit of the period, (b) the franked investment income of the same period, and (c) the undistributed profits of an earlier period or periods. This result is achieved if a single computation is made which shows that the profits for a period including franked investment income are nil or a minus figure (it matters not which for this purpose) and a dividend for that period is nevertheless paid. For, unless the contrary is shown, it can only be assumed that that dividend has been paid out of undistributed profits of earlier periods, which is itself the reason for a distribution charge being made. The proviso to subsection (3) of section 30 of the Act will safeguard the taxpayer from being charged with an amount of tax in excess of the relief previously granted.

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[1] 1957 S.L.T. 115, 119; 35 A.T.C. 480, 484.

The learned Dean of Faculty on behalf of the respondents urged in support of the construction that he invited your Lordships to adopt that it was really meaningless to speak of a nil profit or of adding something to it, and this plea found favour with the Lord President. As I understood it, this was only relevant if the view was accepted that there were two separate operations and not a single computation. In the view which I take, therefore, it does not arise, but I think it right to say that I see no impropriety of language in speaking of a nil profit, where the question is whether any or what profit has been made. And the answer would be equally valid in the case of an exact balance or of a loss.

It was further urged, in an argument which I find it difficult to distinguish from that which I have already discussed, that, even if the proviso applies, upon its proper application the respondents have been wrongly assessed. I quote from their formal case: "Even if the appellants were entitled to take the profits including franked investment income at a minus figure of £330,000 in order to make the calculations set forth in the proviso, the result of the sum was that the excess of the gross relevant distribution (£181,000) over the profits including franked investment income (minus £602,000 plus £272,000 = minus £330,000) was £511,000, which, when added to the profits for the period, gave a figure of minus £91,000 for the net relevant distributions." I think that this argument does no more than deny the validity of the answer "Profits, nil" to the question "What profit is shown by a computation made in accordance with the terms of the proviso?" But, in my opinion, there is no need to go behind that simple answer and inquire whether the computation shows that even with the inclusion of franked investment income there is still a loss. The argument stated in this way does, however, illustrate that the respondents' contention must have a result which defeats the essential purpose of the Act. For year after year a company could continue to pay dividends which could only come out of undistributed profits, but would escape from any payment of distribution charge so long as, even after including franked investment income, it showed no profit. The appellants' contention, on the other hand, appears to me both to be in accord with the natural and primary meaning of the section and to harmonize with the plain purpose of the Act.

I would, therefore, allow the appeal and declare that the respondents were correctly charged to profits tax by way of a distribution charge for the chargeable accounting period November 1, 1952, to October 31, 1953, in respect of the sum of £181,818.

The respondents must pay the appellants' costs in this House and in the Court of Session.

LORD REID. My Lords, the profits tax assessed in this case is a distribution charge. The general scheme of the Finance Act, 1947, is that if a company does not distribute the whole of its profits for a particular period it gets relief for non-distribution by paying a lower rate of profits tax in respect of that part of its profits which it has retained. But when such retained profits come to be distributed the company pays by way of distribution charges what it had saved by way of relief for non-distribution while it retained the profits undistributed. The provisions of the Act are complicated, partly because profits tax may not be payable in respect of the whole of the company's profits. In particular profits tax is not payable in respect of franked investment income which consists, broadly speaking, of dividends received from its investments in other trading companies; the reason being that those other companies will already have paid profits tax on their profits, so that to subject them to profits tax again when they are received by another company as dividends would involve double taxation. The Act also deals with abatements, but this matter does not arise in the present case.

Allowance is made for these factors in calculating the amount of reliefs for non-distribution and distribution charges. These are calculated, not by reference to the total dividends paid by the company (the " gross relevant distributions "), but by reference to the appropriate proportion of them (the " net relevant " distributions "). Section 34 of the 1947 Act sets out alternative formulae by which net relevant distributions are to be calculated and this case depends on the proper interpretation of that section.

In this case, during the relevant period the respondent company suffered a trading loss of £602,000 (in round figures), it received franked investment income amounting to £272,000, and it distributed dividends of £182,000. It had sufficient reserves which had enjoyed relief for non-distribution to enable it to pay this dividend. Admittedly the leading formula in section 34 (2) cannot be applied. The question is whether the alternative formula set out in the proviso to section 34 (2) can be applied. If it can, this appeal must succeed: if it cannot, then the respondent succeeds and no distribution charge is payable.

The proviso is in these terms: " Provided that where the said " gross relevant distributions exceed the profits computed without " abatement and including franked investment income, the net " relevant distributions shall be the sum of—(*a*) the profits for " the period computed with due regard to the provisions for " abatement but not including franked investment income; and " (*b*) the amount of the excess."

It was argued that before the proviso can apply at all there must be a profit and that here there was a loss: even if the franked investment income is taken into account there was a loss of £330,000. I agree that a loss of £330,000 cannot be regarded as a profit of *minus* £330,000, but, in my judgment, it can in accordance with ordinary usage be regarded as a profit of nil. There was no profit, and to say that there was no profit appears to me to be the same thing as to say that the profit was nil. Then it was said that a sum cannot properly be said to " exceed " nil: it can only " exceed " another sum. But, again, I think that in ordinary usage one can properly say that 10 exceeds nil or nothing.

The difficult question in the case appears to me to be the meaning of the words " the profits computed without abatement " and including franked investment income ": what is it that the gross relevant distribution must exceed in order to bring the proviso into operation?

It is said for the respondent that " profits " in the legislation dealing with profits tax means profits apart from franked investment income (which I shall call trading profits although that is not quite accurate); and that therefore what the proviso directs you to do is first to compute the trading profits and then to include, i.e., to add, the franked investment income. In this case the trading profits are nil, the franked investment income is

£272,000, and adding these two together gives £272,000. The gross relevant distributions, £182,000, do not exceed £272,000, and therefore the proviso does not apply. If section 34 could be taken in isolation I might be inclined to accept this argument, but it cannot be so taken.

Schedule IV to the Finance Act, 1937, sets out modifications of the provisions of the Income Tax Acts which were to be applied in computing profits for the purposes of the national defence contribution. In 1946 the national defence contribution was renamed the profits tax and in 1947 extensive alterations were made. In particular, section 32 of the 1947 Act substituted new provisions for those of Schedule IV, paragraph 7 (1), to the 1937 Act. The new sub-paragraph 7 (1) appears to me to make it clear that whenever the word " profits " appears by itself in this legislation it means profits excluding franked investment income. But this is followed in section 32 by a new sub-paragraph 7 (1A), which is, I think, of vital importance in this case: the new provisions are in these terms: " (1) Income received from investments or other property shall be included in the profits except— (*a*) income received directly by way of dividend or distribution of profits from a body corporate carrying on a trade or business to which section nineteen of this Act applies; and (*b*) income so received from any other body corporate, being income received indirectly by way of dividend or distribution of profits from a body corporate carrying on such a trade or business as aforesaid; and (*c*) income to which the persons carrying on the trade or business are not beneficially entitled: Provided that the profits of a body corporate which, either alone or in conjunction with any statutory undertakers carrying on a trade or business to which subsection (5) of the said section nineteen applies, has a controlling interest in any other body corporate, being such statutory undertakers as aforesaid, shall not in any case include any income received from that other body corporate. (1A) Any reference in any enactment relating to the profits tax to franked investment income shall be construed as a reference to the income which would be included in the profits if paragraphs (*a*) and (*b*) of the preceding sub-paragraph had been omitted, and, in computing profits for the purposes of so much of any such enactment as refers to profits including franked investment income, the said sub-paragraph shall have effect as if the said paragraphs (*a*) and (*b*) were omitted."

Sub-paragraph (1) is not obscure. Leaving aside paragraph (*c*) and the proviso which throw no light on the present question, it includes in " profits " for the purposes of profits tax all income from investments except such income as is described in paragraphs (*a*) and (*b*)—chiefly dividends from the company's investments in other trading companies. Put more simply, that means that such dividends are not to be included in " profits " for profits tax purposes.

Sub-paragraph (1A) is more than a little obscure. The first part of it appears to be no more than a verbose way of attaching the name " franked investment income " to the kinds of income described in paragraphs (*a*) and (*b*) of sub-paragraph (1). (I follow the statute in referring to parts of a sub-paragraph as paragraphs.) And at first sight the second part might seem to be no more than an elaborate statement of an obvious consequence of so naming those kinds of income. But on closer examination it appears to me that this second part has an operative effect which is really decisive of the present case.

In the legislation dealing with profits tax the word " profits " frequently occurs. Sometimes it is qualified by the words " including franked investment income ": often it is not so qualified. When it is not so qualified sub-paragraph (1A) can have no application, and if in these cases it is necessary to compute the profits, then the computation must be made in the manner provided by sub-paragraph (1). But where the word " profits " is so qualified and the provision requires profits to be computed, then sub-paragraph (1A) applies and the computation must be made in the manner provided by this sub-paragraph and not in the manner provided by sub-paragraph (1). Normally when the same word is used repeatedly in the same section or group of sections one presumes that it is intended to have the same meaning. But it appears to me that sub-paragraph (1A) treats the words " profits including franked investment income " as a composite phrase with a special meaning and effect: it directs that where profits have to be computed for the purposes of a provision in which this phrase is used the computation shall be made in the manner which would be provided by sub-paragraph (1) if paragraphs (*a*) and (*b*) were deleted from that sub-paragraph. Deleting these paragraphs and again leaving aside paragraph (*c*) and the proviso, sub-paragraph (1) would provide: " Income received from investments or other property shall be " included in the profits." In other words, all dividends received by the company are to be taken into account in making the computation of profits whether they are franked investment income or not.

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INLAND REVENUE COMMISSIONERS
v.
SOUTH GEORGIA CO. LTD.

Lord Reid.

There may have been good reason for adopting this cumbrous and unusual method of drafting—I do not know. I am very conscious of the fact that all the learned judges of the First Division attach another and a simpler meaning to sub-paragraph (1A). The Lord President said[2]: " Throughout these two " sub-paragraphs, therefore, what I have called trading profits " and franked investment income are treated as quite distinct " and separate, and ' profits ' per se exclude any part of the " franked investment income "; and later[3]: " If it could have " been said that the statutes had contemplated that the profits " could only be ascertained after franked investment income had " been taken into account, then there might have been plausibility " in the appellants' argument. But this is not the situation." Lord Sorn said[4]: " The scheme consistently shows that profits " are to be calculated separately from franked investment " income." But giving the best consideration I can to the matter I have been forced to a different conclusion. To my mind, the compelling words in sub-paragraph (1A) are " *in computing* " *profits* . . . the said sub-paragraph shall have effect as if the " said paragraphs (*a*) and (*b*) were omitted."

I must now turn back to the proviso to section 34 (2) and in particular the words " the profits computed without abatement " and including franked investment income." Here the words " computed without abatement and " are interposed between " profits " and " including franked investment income," but I do not think that that is material. It appears to me that this is an enactment which in the words of sub-paragraph (1A) " refers to " profits including franked investment income." If the view which I have already expressed is right, then these profits must be computed as directed by sub-paragraph (1A) and franked investment income must be taken into account in making that computation. The trading loss being £602,000 and the franked investment income £272,000, the result of taking both into computation is that there were no " profits computed without " abatement and including franked investment income." I have already given my opinion that that is equivalent to saying that such profits were nil. If that be so it follows that the assessment in this case was properly made. In my judgment, this appeal should be allowed.

[2] 1957 S.L.T. 115, 118; 35 A.T.C. 480, 483.

[3] 1957 S.L.T. 115, 118; 35 A.T.C. 480, 484.

[4] 1957 S.L.T. 115, 120; 35 A.T.C. 480, 486.

Lord Tucker. My Lords, I also agree that this appeal should be allowed for the reasons which have been stated by my noble and learned friends.

Lord Keith of Avonholm. My Lords, the object of the profits tax legislation is reasonably clear, though the effect of the formulae by which it is sought to achieve that object may not be so immediately apparent. Indeed, the whole point of this appeal is whether one of the formulae is apt to achieve the object of the statute. In imposing a profits tax upon the profits of a company Parliament has allowed a certain relief in respect of profits that are retained by the company and not immediately distributed to the shareholders, called relief for non-distribution, and has imposed a compensating charge upon these profits if they come to be subsequently distributed, called a distribution charge. That at least was Parliament's intention though, if the respondents' contentions and the judgment of the court below, as well as the determination of the commissioners, are right, there is a gap in the legislation which prevents that intention, in present circumstances, from taking effect.

It is important to observe that " profits " of a company are not confined under the relevant statutes to trading profits. While trading profits are to be computed for the chargeable accounting period on income tax principles, as they would be under Case I of Schedule D of the Income Tax Acts, there is to be included, with certain exceptions, in the profits assessable to profits tax. income from investments or other property. This was so in certain cases under section 20 and the original paragraph 7 of Schedule IV to the Finance Act, 1937, and though the original paragraph 7 has now been replaced by a new paragraph 7 in somewhat different terms, this conception is still retained. As matters now stand, there is to be included in the profits all income received from investments or other property except what is referred to as " franked investment income " and some other categories of income absent from this case. Franked investment income is income received from other bodies corporate on which profits tax has already been paid.

Section 19 of the Finance Act, 1937, is the provision under which the tax is charged. It was levied originally at the rate of 5 per cent., with no provision for relief in respect of non-distribution or compensating charge in respect of distribution. Subsection (2) of section 30 of the Finance Act, 1947, introduced non-distribution relief where " the net relevant distributions to "proprietors . . . for any chargeable accounting period are *less* "than the profits . . . for that period chargeable to the profits "tax." Subsection (3) of the same section prescribed a distribution charge where "the net relevant distributions to "proprietors . . . for any chargeable accounting period are *greater* "than the profits . . . for that period chargeable to the profits "tax."

"Net relevant distribution" is explained in section 34 (2) of the Act of 1947. I quote the subsection in full: "The net "relevant distributions to proprietors for any chargeable accounting period of a body corporate, society or other body are so "much of the gross relevant distributions to the proprietors for "that period of that body corporate, society or other body (as "defined by the next succeeding section) as bears to the whole "of the said gross relevant distributions the same proportion "that the profits for that period bear to the profits therefor computed without abatement and including franked investment "income: Provided that where the said gross relevant distributions exceed the profits computed without abatement and "including franked investment income, the net relevant distributions shall be the sum of—(*a*) the profits for the period "computed with due regard to the provisions for abatement but "not including franked investment income; and (*b*) the amount "of the excess."

A few calculations will show that where the amount distributed as dividend to the shareholders is less than the profits plus the franked investment income (if any) of a company for the relevant accounting period the "net relevant distribution" calculated according to the first part of the subsection will always be less than the profits. A balance is attained where profits and franked investment income exactly meet the amount distributed as dividend. There is then a net relevant distribution equal to the profits. No occasion arises for non-distribution relief nor for a distribution charge. The profits excluding franked investment income are taxed at the full rate of charge and that is all. But where the dividend to the shareholders is greater than the profits including the franked investment income, the formula so far applied breaks down. It takes no account of the sum drawn from reserves to make up the dividend and so the figure brought out as the net relevant distribution will not be appropriate for the purpose of calculating the distribution charge under section 30 (3) of the statute. A new formula, as prescribed by the proviso, is accordingly introduced to be applied where the dividend paid out in any year is greater than the profits including franked investment income. This achieves, at least where there is a profit, that the full profits tax is charged. Tax at 22½ per cent. is charged on the profit for the year, excluding the franked investment income. The franked investment income which has already borne the full tax and is now distributed to help to make up the dividend pays nothing further, and on the balance, which ex hypothesi has been drawn from past profits to meet the dividend and has already borne tax at the rate of 2½ per cent. in respect of non-distribution relief, the company pays the distribution charge of 20 per cent.

So far the scheme of the statute seems plain. But it is said for the respondents and has been held by the Court of Session and the commissioners to break down in the circumstances of this case, because there are no profits to which the proviso can apply. There was in fact a substantial loss, even including franked investment income. Further, it is said that if there are no profits franked investment income cannot be included in the profits. Franked investment income accordingly, if it falls to be brought in at all, falls to be brought in by itself and as, added to nothing, it exceeds the amount of the dividend paid, the proviso does not apply.

My Lords, I have come to the opinion that the contentions of the respondents and the reasoning of the learned judges in the court below are unsound. If the phrase found in the proviso "profits computed without abatement and including franked "investment income" were taken by itself, without any aid from any other part of the statute, I should have thought that it meant that profits and franked investment income were to be computed together to arrive at a total profit. If there is no profit with the inclusion of the franked investment income, then total profit, as I see it, would be nil. It is to be remembered that profit for the purpose of profits tax includes investment income which is not franked and that the exclusion of franked investment income from the profit is to prevent it being taxed a second time. This is, I think, clear from the provisions of sub-paragraph (1) of paragraph 7 of Schedule IV to the Act of 1937, as amended by the Act of 1947. But what is conclusive, in my opinion, is sub-paragraph (1A) of the same paragraph which, in effect, enacts that "in computing profits for the purposes of so much of any "such enactment as refers to profits including franked investment "income" franked investment income shall be computed in the profits. In the opening words of the proviso franked investment income cannot therefore be treated as something standing outside or apart from profits or losses. It must be included in striking a balance of profit or loss.

That leaves the question whether, if there is a loss after bringing in franked investment income the proviso applies. In my view, the profits must then be regarded as nil and the calculation under the proviso must be made from this level. There is nothing in the proviso which excludes such an interpretation and such a reading is consistent with the whole object of the statute. As already indicated, the formula of the proviso is designed to secure that any draft from past undistributed income to make up a distribution of dividend should bear its proper share of the distribution charge. This object would be entirely defeated if a company which operated in any year at a loss and paid a dividend out of past profits were to pay no distribution charge. An application of the formula in the proviso to such a case, by taking profits as nil, involves, I think, no straining of the statutory language.

I would allow the appeal.

LORD SOMERVELL OF HARROW. My Lords, I agree with the opinion delivered by my noble and learned friend on the Woolsack and have nothing to add to it.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Thomas Cooper & Co. for Beveridge & Co., Edinburgh.*

F. C.

END OF VOLUME AND OF APPEAL CASES FOR 1958.

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WEST AFRICA (*Gold Coast*)—*Jurisdiction—Chief Commissioner's Court—Commissioner's appointment rescinded—Judgment delivered without jurisdiction—Nullity—Subsequent appointment—Review—Second judgment in identical terms—Not a nullity—"Judgment"—Inherent power to set aside judgment delivered without jurisdiction—Courts Ordinance* (*Laws of the Gold Coast*, 1936, *c.* 4), *s.* 63; *Sch. III*, *Ord.* 41, *rr.* 1, 2.

Practice—Order—Recall—Order without jurisdiction—Inherent power of court which made order to set it aside.

KOFI FORFIE, ODIKRO OF MARBAN *v.* BARIMA KWABEMA SEIFAH, KENYASEHENE **J.C. 59**

ERRATUM

[1957] A.C., at p. 115, line 15. *For* "section 9," *read* "section 13."

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